Argued
Dismissed
Submitted Filed.
June 22-1880
Motion to dismiss
Nov. 28. 1878
1879
10-675

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~868.~~ 547 275

ERASMUS NAGLE, PLAINTIFF IN ERROR,

vs.

THOMAS W. RUTLEDGE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

FILED OCTOBER 12, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 868.

ERASMUS NAGLE, PLAINTIFF IN ERROR,

vs.

THOMAS W. RUTLEDGE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Wyoming, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between Erasmus Nagle, plaintiff, and Thomas W. Rutledge, defendant, a manifest error hath happened, to the great damage of the said Erasmus Nagle, as by his complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
2 United States, together with this writ, so that you may have the same at Washington, on the second Monday of next October, A. D. 1877, on the 8th day thereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this the 18th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

(Indorsed:) Doc. 1, No. 95. Erasmus Nagle vs. Thomas W. Rutledge. Writ of error. Filed June 18th, 1877. J. W. Bruner, clerk supreme court.

3 Be it remembered that heretofore, to wit, on the 18th day of August, A. D. 1876, there was filed in the clerk's office of the supreme court of the Territory of Wyoming a petition in error, and transcript, in the words and figures following, to wit:

Petition in error.

TERRITORY OF WYOMING:

In the supreme court.

ERASMUS NAGLE, PLAINTIFF IN ERROR,
vs.
THOMAS W. RUTLEDGE, DEFENDANT IN ERROR.

The said Erasmus Nagle, plaintiff in error herein, complains of the said Thomas W. Rutledge, defendant in error herein, and avers that heretofore, to wit, on the 21st day of July, A. D. 1876, the same being one of the regular days of the May, A. D. 1876 term of the district court of the first judicial district of the Territory of Wyoming, sitting within and for the county of Laramie, the said defendant in error,
4 by the consideration and judgment of the said district court, did recover a judgment against the said plaintiff in error, in said district court, for the sum of nine hundred and thirty-nine and $\frac{93}{100}$. and the costs of the action, in an action pending in said district court wherein the said Thomas W. Rutledge was plaintiff and the said Erasmus

Nagle was defendant; that said judgment was a final judgment of said district court in the said action pending therein.

And the said plaintiff in error further alleges that in the record and proceedings of said cause in said district court there is material and manifest error to the prejudice of this plaintiff in error in the following particulars, to wit:

1. The said district court erred in not setting aside and vacating the verdict of the jury rendered in the cause, the said verdict not being sustained by sufficient evidence and being contrary to law.

2. The said district court erred in overruling the motion of the
5 defendant in said cause at the conclusion of the evidence for the plaintiff therein to compel the said plaintiff therein to elect on which of the several causes of action shown by his evidence he will proceed to verdict and judgment.

3. Because the said district court erred on the trial of said cause in refusing to give to the jury instruction number eight, as requested by the defendant therein, which instruction was as follows, to wit:

"8. If you find from the evidence that any portion or portions of the demand sued for in this action accrued or became due from the defendant to the plaintiff upon express contract or contracts which were entirely independent of and disconnected from the other portion or portions of the demand sued for, then you can find a verdict only for a single one of said distinct demands."

4. Because said district court erred in giving to the jury on the trial of said cause instruction No. 1, as requested by the plaintiff
6 therein; which instruction was as follows, to wit:

"1. The debtor who owes his creditor money on distinct accounts may direct his payments to be applied on either as he pleases. If the debtor makes no appropriation, the creditor may apply the money as he pleases."

5. That said district court on the trial of said cause therein erred in giving to the jury the instruction No. 2, as requested by the plaintiff therein; which instruction is as follows, to wit:

"2. If you find in this case that Rutledge was, prior to the commencement of the building, indebted to the defendant on two or more accounts, he had a right to apply the payments made to either, as he chose, in the absence of an appropriation by Nagle. And if he applied his payments to the note, it would be sufficient payment to support the plea of payment by plaintiff in his reply."

6. That said district court erred on the trial of said cause in giving to the jury, upon its own motion, the following instructions, to wit:

"The plaintiff's petition set out that def't employed the pl'ff to
7 erect a store-house for him on the corner of Ferguson & 17th streets, in Cheyenne; that there were no specific terms agreed on between them, so far as the amount to be paid for its construction was concerned, although he admits that certain portions of the building were constructed under special stipulations, but alleges that the def't failed to comply with his part of the stipulations; hence he (pl'ff) is released from such special contracts, and therefore presents his account for materials furnished, and for work and labor. Now, if the evidence satisfies you that the building was to be erected in the manner and upon the terms claimed by plaintiff, then you are to find whether the charges made by plaintiff are, or were, the reasonable value of such materials and labor at the time they were furnished; and if so, then your verdict should be on that basis, deducting from the amount thus found the sev-

eral sums shown by the evidence to have been paid by defendant before, during, and since the construction of the building."

8 7. The said district court erred in overruling the plaintiff's motion therein to vacate and set aside the verdict therein, and to grant a new trial.

8. That said district court erred in rendering a judgment in said cause for the plaintiff therein.

Plaintiff in error alleges that a transcript of the record and proceedings in said cause in said district court, marked "A," is attached hereto and filed herewith, showing all the errors aforesaid.

Wherefore said plaintiff in error prays judgment herein, that the said judgment of said district court may be reversed and a new trial therein awarded, and that plaintiff in error may be restored to all things he has lost by reason thereof.

W. W. CORLETT,
Attorney for Pl'ff in Error.

AUGUST 11TH, 1876.

Leave is hereby given to the plaintiff in error named within to file the within petition in error in the supreme court of Wyoming Territory.

9 J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

(Endorsed on the back as follows:) Territory of Wyoming. In supreme court. Erasmus Nagle, pl'ff in error, vs. Tho's W. Rutledge, def't in error. Petition in error. Filed August 18th, 1876. J. W. Bruner, clerk sup. court. W. W. Corlett, att'y for pl'ff in error.

10 *Exhibit C.*

A.

Bought of E. Nagle:

1872.			Page.	
Jan'y 12.	1 s'ck flour, 5.50	J.	22	5 50
15.	1 gall. c. berries		25	1 00
19.	5½ butter, 45c		33	2 47
22.	2 doz. eggs, 45		36	90
Feb'y 1.	3 q'ts syrup		56	1 31
	½ box raisins, 1.75; 25 c. meal, 1.00; pail lard, 1.90.		"	4 65
M'ch 8.	5 lbs. coffee, 2.00; lard, 1.90; eggs, 70		117	4 60
13.	2 doz. eggs, 30		125	60
23.	M'd'se per Widdop		142	4 70
	1 plane & bitt		"	5 00
May 20.	112 lbs. corn, 1½		231	1 70
21.	Sund. m'd'se		234, 5, & 6	16 98
23.	Butter, 3.50; potatoes, 4.72		238	8 22
24.	Sugar, 2.00; matches, .25		240	2 25
	10 cords wood, @ 6.50	P. Q.	36	65 00
25.	Flour, 6.00; oats, 2.80	J.	242	8 80
20.	Sugar	"	250	1 00
31.	Sund. m'd'se	"	252	11 38
	25 lbs. salt	"	253	1 00
	1 pail		255	50
June 3.	142 lbs. oats, 284; 128 lbs. corn, 1.92	"	260	4 76
6.	Sund. m'd'se	"	266	36 13
7.	115 lbs. corn, 1.73; 141 lbs. oats, 2.82	"	266	4 55
8.	9 lbs. butter, 35, 3.75; ¼ lb. smo. tob., 20	"	270	3 35
	10½ cords wood, @ $6.50 (see Cust. Cn. 5 M bill)	P. L.		68 00
10.	1 b'l salt		271	5 50
10.	⅔ A. Simmons (see order)			66 00

	11.	Sund. m'd'se	J.	274	19 86
	12.	" " (per Widdop)		275	3 00
	14.	" "	"	277	14 28
"a"	15.	½ s'ck flour (per Widdop)	"	279	3 00
	17.	M'd'se, 1.25; 165 lbs. oats, 3.72	"	282	4 97
11	18.	1 lb. pepper	journal	284	40
"a"	20.	M'd'se' (p'r Widdop)	"	286	2 35
"a"	"	" (" ") 1 lb. tea	"	287	1 75
		" soap			50
		" cigars p'r Cecil	"		1 00
	21.	Soap, 50; lye, 50	"	288	1 00
"a"		M'd'se, (Widdop)	"	"	83
	22.	"	"	289	762 0
	24.	" 1 pail	"	292	5 0
	"	10 doz. eggs, 25	"	293	2 50
		Can Y. powd., 2.50; cigars, 3.50	"	"	6 00
	"	322 lbs. oats (per P. Hamma)	"	"	6 44
	26.	M'd'se	"	297	5 73
	28.	"	"	299	7 60
	"	Order to Tho's Castle (see cash b.)		265	24 00
	29.	M'd'se		301	2 75
"a"		" (p'r Widdop)		"	1 00
		" (" P. Hamma)		302	6 50
July	1.	R. R. ch'g's, on 27 cars stone (see cash & ex'p. bills)			270 00
		Paid Cha's Feldham for stone (see Feldham's bill)			405 00
June	1.	" cash for digging cellar (see rec'pt)			120 00
July	1.	Cash (see cash-book), page		267	125 00
	1.	" " " " "		"	100 00
		2 cars wood, 19½ cords, 6.50; exp. bills, cars 2234, 2002			126 75
	1.	M'd'se	J.	305	6 92
"a"	1.	3 cans peaches (p'r Widdop)		305	1 00
	3.	"	"	307	10 20
		153 lbs. oats, 2		308	3 06
	6.	M'd'se		311	8 70
	6.	Ch'k on P. S. Wilson (see c'k)			165 00
	8.	M'd'se		314	21 50
"a"	9.	" (p'r Widdop)		315	70
"a"	10.	" " "		316 & 17	1 45
12 July	10.	4,336 f't lumber @ $30.00	P. L.	167	130 08
		Drayage on lumber	"	"	4 50
	11.	143 lbs. oats	J.	317	2 86
		10 cords wood, car No. 447	"	167	65 00
	16.	156 lbs. oats	"	325	3 12
	17.	M'd'se		"	9 85
	18.	Cash, freight on 8 cars stone, exp. bill marked "H. H." (see cash-book), page		273	80 00
		Tea, 1.50; jelly, 40		328	1 90
"a"	19.	Cigars, 1.50; tob. for Cecil			1 40
		Oatmeal, 50; eggs, 50; starch, 20		330	1 20
	20.	M'd'se		332	23 38
"a"	22.	1 box cigars (p'r Cecil)		334	3 50
	23.	Soap		335	1 00
	24.	Sund. m'd'se		337	19 30
"a"	25.	10½ cords wood, 6.50; car N. 1354			68 25
	10	" " 6.50; " " 4926			65 00
	27.	1 plug tob		340	35
	29.	M'd'se		343	5 43
	30.	"		344	3 96
Aug.	3.	Ch'k to P. Hamma	C. B.	279	100 00
		M'd'se		349	24 02
		"		350	7 20
	5.	"		351–53	16 70
	7.	"		356	4 40
	8.	"		"	5 15
	8.	"		357	3 34
	9.	"		359	75
	10.	"		359	12 20
		"		361	4 05
	12.	"		362	2 45

13	Aug.	12. M'd'se.....J.	363		50
		13. 5 doz. eggs.....	"	1	50
		14. 1 box lye.....			25
		15. M'd'se	367	17	53
		"	368	3	40
		16. "	368, 69	1	70
		17. "	369	3	08
		17. Cash.....C. B.	285	50	00
		19. M'd'se.....	372	51	18
		20. ½ s'ck flour.....	374	3	25
		22. M'd'se.....	376, 7	8	19
		23. "	378	1	05
		24. "	380	1	45
		26. "	381	2	92
		27. "	382		80
		28. "	384	10	71
		" "	385	3	25
		29. "	385	2	30
		30. "	387	1	37
		31. "	388		25
	Sept.	3. "	392	13	58
		" "	393	4	38
		4. "	394		72
		5. "	395		55
		6. "	398	3	54
		7. "	398	22	96
		9. "	400		85
		10. "	403		60
		14. 1 pail.....	410		50
		" Bill m'd'se.....	411	6	71
14	Sept.	14. Paid Vandegros ch'k & order .....C. B.	8	300	00
		17. M'd'se .....J.	414	4	30
		18. M'd'se	417	7	60
		20. "	420, 21	1	30
		" Cash ch'k to Vandegrifts.....C. B.	11	200	00
		21. Rutledge assumes ⅔ of Jos. Widdop to date		14	35
		23. 155 lbs. oats (pr. H. Ober).....	424	2	72
"a"		24. Order for m'd'se to Widdop	425	5	00
		25. M'd'se	428	25	16
		"	429	1	00
		30. 5,340 f't lumber from M. V. Boughton @ $30.....		160	20
		720 " joist, bo't of Boughton, at request of Rutledge	33	23	75
		Paid D. Farrar on his ⅔.....		3	00
		30. M'd'se .....J.	437	10	36
	Oct.	2. " .....Journal "a"	3	6	45
		3. "	4	6	02
		4. Paid bill Ja's Talbot (see bill).....		63	00
		4. M'd'se	7		25
		7. "	11	7	27
		Ch'k on P. S. Wilson.....C. B.	17	25	00
		8. M'd'se	11	3	00
		10. "	15	1	15
		11. "	16	2	50
		12. Cash p'd on order to bricklayers.....C. B.	19	100	00
"a"		" " for recording mortgage..... " "	11	2	00
		14. M'd'se	21		60
		15. "	22	1	84
		"	23	2	70
		18. "	26		25
15	Oct.	19. M'd'se .....J.	28	4	39
		21. "	30	12	36
		Paid order to Pease & Taylor on ⅔ (see order).....		200	00
		" " " carpenters .....C. B.	23	20	00
		24. M'd'se	34	2	28
		"	35	5	80
		25. "	36	12	00
		26. "	37	1	75
		"	38	1	14

		Loaned $20.00; returned on 28th $20			
	26.	Paid bricklayers,	C. B.	23	100 00
	29.	M'd'se		43	2 70
	31.	"		46	2 68
Nov.	1.	"		47	30
	2.	"		49	2 70
	4.	"		51	35
		"		52	4 00
	4.	Cash	C. B.	27	30 00
		" bill lumber of De Kay (see bill)			14 40
	8.	M'd'se		58	3 33
	9.	Cash paid Vandegrof, ch'k	C. B.	29	100 00
		" " Alber	" "	"	40 00
		" " Dawson	" "	"	30 00
		" " Culbreth	" "	"	8 25
	12.	M'd'se		65	1 45
	14.	"		68	3 65
	16.	"		71	4 35
	16.	Cash p'd sund. persons	C. B.	33	49 25
	18.	" " De Kay	" "	"	30 00
		21. M'd'se		79	1 00
16	Nov.	22. Order to Tuttle (see order)			10 80
		23. " " sund. persons (see order)	C. B	35	63 85
	25.	M'd'se.		92	1 75
	27.	"		96	7 26
	30.	"		105	75
	30.	Cash paid carpenter	C. B.	37	43 00
Dec.	"a" 2.	" (p'r De Kay)	" "	39	11 00
	2.	Bill for locks H. & H., 16.00; keg nails, 8.50			24 50
		1 p'r butts, 1.00; 2 mortice-locks, 3.50; lumber, 19.75			24 07
	7.	Order to Olber			23 00
		" " Barnhesel			20 00
	13.	" " Dawson			8 00
	14.	" " Abber			19 00
		" " Barnheasel			16 00
"a"		Glass points			50
"a"		Do. do. putty			55
	16.	H. & H. bill to date			45 45
"a"	"	Putty & glass points			1 05
"a"	23.	Hurlbut Bro's, for putty			5 50
	24.	Order to Talbot (see order)			182 50
	28.	" " Tuttle " "			41 20
"a"		Paid hauling 12 loads old brick			6 00
		Drayage			4 00
"a"	28.	29 lbs. putty			2 90
"a"		Making trap-door			2 50
"a"		84 f't lumber, 1.44; screws, .35			1 79
	1873.				
'a"	Jan'y 31.	Bill of John Corkish (see bill)			27 45
'M'ch		11. " " F. Scweickert	C. B.	95	2 35
April		29. Order to J. E. Tuttle			65 12
May		3. Paid Hardesty for work on doors and transoms up-stairs	J'rnal B, page	122	6 00
					5,133 65
		Promissory note			210 00

Interest on note from maturity to date of occupancy of building, Jan'y 1st, 1874.

17 Be it remembered that heretofore, to wit, on the 12th day of November, A. D. 1874, there was filed in the clerk's office of the district court of the first judicial district of the Territory of Wyoming an amended petition, in the words and figures following, to wit:

Amended petition.

In district court of the first district in and for Laramie County.

THOMAS W. RUTLEDGE
vs.
ERASMUS NAGLE. } Petition.

Thomas W. Rutledge, plaintiff, complains of Erasmus Nagle, defendant, for that said defendant, on the 1st day of January, A. D. 1873, was indebted to plaintiff in the sum of seven thousand three hundred and forty-six dollars and nineteen cents, for work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time performed and bestowed in the erection of the two-story brick
18 building situated on the corner of 17th and Ferguson streets, in Cheyenne, Laramie County, Wyoming Territory, for said defendant and at his request, and also for materials and other necessary things by the said plaintiff before that time furnished and provided for in and about the said building, and at his like request, and which said services and materials, and other things so furnished as aforesaid, were reasonably worth the said sum of seven thousand three hundred and forty-six dollars and nineteen cents, and which said sum plaintiff avers was then due and payable, and yet the said defendant, though often requested, hath not paid said sum of money, or any part thereof; wherefore plaintiff prays judgment for said sum of $7,346.19, with legal interest and costs of suit.

E. P. JOHNSON,
Att'y for Pl'ff.

(Endorsed on the back as follows, to wit:) Thomas W. Rut-
19 ledge vs. Erasmus Nagle. Amended petition. Filed November 12th, 1874. J. W. Bruner.

And thereafter, to wit, on the 25th day of May, A. D. 1875, there was filed in the clerk's office of said court an answer to said amended petition, in the words and figures following, to wit:

Answer.

TERRITORY OF WYOMING,
County of Laramie, ss:

In district court, first judicial district.

THOMAS W. RUTLEDGE, PLAINTIFF,
vs.
ERASMUS NAGLE, DEFENDANT. } Answer to amended petition.

1. And now comes the said defendant, Erasmus Nagle, by W. W. Corlett, his attorney, and, for answer to the said amended petition, denies each and every allegation therein made.

2. For further answer and defense, said defendant alleges that
20 before the commencement of this action he fully paid the said plaintiff the full amount due him on account of all and singular the matters and things set forth and alleged in said amended petition.

3. For a further answer and defense this defendant avers that on or about the day of , A. D. 1872, the said plaintiff and defendant

entered into a contract whereby said plaintiff undertook and promised to erect and complete the said building for said defendant, and furnish the materials therefor, in a good, workmanlike manner, by the 15th day of August, A. D. 1874, according to plans and specifications then agreed on and understood between plaintiff and defendant verbally, and also agreed, the better to facilitate the erection of said building according to the true intent of the parties, to furnish a written draft of said plans and specifications; and the said defendant then and there undertook and promised the plaintiff, in consideration of the aforesaid under-
21 takings and promises of the said plaintiff, to pay him for the erection and completion of said building and furnishing the materials therefor, the sum of five thousand five hundred and thirty dollars when the said work was completed. And the said defendant avers that before the commencement of this action he fully performed all the undertakings, agreements, and obligations thereof on his part to be performed, and further avers that said contract herein alleged and set forth relates to and includes the same and all matters and things averred and set forth in said amended petition.

4. And the said defendant, for a counter-claim to the said alleged cause of action set forth in said amended petition, alleges that said plaintiff did not erect and complete said building at the time agreed upon as aforesaid, but neglected and failed so to do, whereby defendant was deprived of the use of said building for the period of three and $\frac{1}{3}$ months, to his damage $500.00; and that the said plaintiff did not erect and complete the said building according to said plans
22 and specifications in the following particulars: That he failed to finish one room on the first floor of said building, to the damage of defendant $112\frac{00}{100}$; that he failed to finish the casings and finish on two windows in said room and the base-boards in said room, and to finish the painting thereof, to the damage of defendant $50\frac{00}{100}$; that he failed to make and place in said building a trap-door and stairs for cellar, and failed to erect a pair of stairs on the outside of said building, to the damage of defendant $50.00; that he failed to construct twelve feet of sidewalk and finish a door-frame and construct stairs from sidewalk to cellar, to the damage of defendant $48.00; that he failed to construct the said building so that the first story thereof would be fourteen feet in height between floor and ceiling, and that the same as constructed was six inches less than said fourteen feet in height, to the damage of the defendant five hundred dollars; that he failed to furnish a written draft of said plans and specifications as agreed, to
23 the damage of the defendant one hundred and twenty-five dollars; that he failed and neglected to perform said work and labor in a workmanlike manner, to the damage of the defendant five hundred dollars. Wherefore, defendant prays judgment against said plaintiff upon this counter-claim for the sum total and aggregate of said damages so as aforesaid sustained, to wit, the sum of one thousand three hundred and forty dollars.

5. And the said defendant, for an offset and cause of action against said plaintiff, alleges that heretofore, to wit, on the 24th day of June, A. D. 1872, at the county aforesaid, the said plaintiff made his promissory note in writing, dated on that day, and delivered the same to the defendant, and then and there and thereby promised to pay to the said defendant thirty days after the date thereof the sum of two hundred and ten dollars, with interest thereon at the rate of three per centum per month. This defendant alleges that said note became due and
24 payable on the 24th day of July, A. D. 1872, but no part thereof

has been paid, and that a copy of said note is attached and filed herewith marked "A."

Wherefore, defendant prays judgment against said plaintiff, upon said note and offset herein, for the sum of two hundred and ten dollars, with interest thereon at the rate of three per centum per month, since June 24th, 1872.

W. W. CORLETT,
Att'y for Defendant.

A.

$210.00.] CHEYENNE, *June 24th*, 1872.

Thirty days after date I promise to pay to the order of E. Nagle two hundred & ten dollars, interest after maturity at rate of 3 % per month until paid.

Value received.

T. W. RUTLEDGE.

(Endorsed on back as follows, to wit:) Answer to amended petition. Filed May 25th, 1875. J. W. Bruner, clerk.

25 Thereafter, to wit, on the 27th day of May, A. D. 1875, there was filed a reply in the words and figures following, to wit:

Reply.

In the district court of the 1st judicial district in and for Laramie County.

THOMAS W. RUTLEDGE
vs.
ERASMUS NAGLE. } Reply.

And now comes the above-named plaintiff, and for reply to the answer of defendant, denies the second defense set up in said answer, alleging full payment of plaintiff's claim, and avers that the same is untrue.

And for a further reply, plaintiff denies each and every allegation in the defense numbered 3 in said answer.

And for a further reply, plaintiff denies each and every allegation in the defense numbered 4, as set forth in said answer.

And for a further reply, plaintiff avers that the note set up as
26 an offset in the 5 defense in said answer was, prior to the commencement of this suit, wholly paid by plaintiff, and discharged, and there is nothing due defendant on said note.

E. P. JOHNSON,
Att'y for Def't.

(Endorsed on the back as follows, to wit:) Tho's W. Rutledge vs Erasmus Nagle. Reply. Filed May 27th, 1875. J. W. Bruner, clerk

And thereupon, at our regular May term, A. D. 1876, and during said term of court an entry was made in the journal of said court, in the words and figures following, to wit:

Entry in journal of court.

May term, A. D. 1876.

WEDNESDAY, *June 14th*, 1876.

T. W. RUTLEDGE
vs. } No. 341.
27 ERASMUS NAGLE.

Now comes the plaintiff in this action, with E. P. Johnson and Tho's J. Street, esqrs., his attorneys, and the said defendant, with W. W. Corlett, esqr., his attorney, and both parties announce themselves ready for trial. Whereupon, to try the issue herein joined, comes the following jury, viz: August Guick, W. W. Smith, W. M. Masi, George Durbin, John A. Martin, John Fisher, J. W. Hallis, Frank Menea, Charles Masten, H. Altman, J. Newkirk, and George Emery, twelve good and lawful men of the body of Laramie County, who, being duly empannelled, tried, accepted, and sworn to well and truly try the issue herein joined, and a true verdict to render, according to law and the evidence, and the evidence for the plaintiff having been adduced, the said plaintiff rests his case. Whereupon, the said defendant, by his counsel aforesaid, now here moves the court to compel the said plaintiff to elect on which of the several distinct causes of action shown by
28 his said evidence he will proceed to verdict and judgment herein, which motion, being fully argued by said counsel, and being duly considered, is by the court overruled; to which ruling of the court said defendant, by his counsel aforesaid, excepts, and the hour of adjournment having arrived, the court instructs the jury with reference to their duty during the adjournment of the court, and, by consent of the counsel for both parties to this action, said jury is by the court permitted to separate, and excused from further attendance upon the court until to-morrow morning, nine o'clock.

J. W. FISHER,
Judge First Judicial District.

Bill of exceptions.

TERRITORY OF WYOMING,
County of Laramie, ss:

In district court, first judicial district.

THOMAS W. RUTLEDGE, PL'FF,
vs.
ERASMUS NAGLE, DEF'T.

29 Be it remembered that on the fourteenth day of June, A. D. 1876, the same being one of the regular trial-days of the May (1876) term of said court, the issues in this action came on for trial upon the amended petition of the plaintiff, the answer of the defendant, and the reply thereto of the plaintiff, before the honorable J. W. Fisher, chief justice of the supreme court of Wyoming Territory, and presiding judge of the district court for said first judicial district, and a jury was impannelled and sworn.

Testimony of T. W. Rutledge.

The plaintiff, to maintain the issues upon his part, produced as a witness THOMAS W. RUTLEDGE, who, being sworn, testified as follows:

I am the plaintiff in this action. The building in controversy is situated at the corner of Seventeenth and Ferguson streets, in Cheyenne, Laramie County, Wyoming Territory. This book is a memorandum of the work performed and materials furnished. The memorandum was made in 1872, by myself, during the time of the transaction. I
30 built the entire building, and furnished all the materials except iron and glass. I built it in 1872. I think it was completed in 1873. I don't remember. I built it at M'r Nagle's instance. I furnished stone. M'r Nagle furnished stone, but it was to be charged to me. The amount furnished was 96 & ¾ yards, according to measurement of M'r Nagle and myself. The measurement was taken in his store before the work was done. I never measured it since. The work was reasonably worth $822.25—what I have charged for it. The stone-work was stone, lime, and mortar, and was done in a good, workmanlike manner. The building was eighty-four feet by twenty-four. I don't remember how thick the walls were, nor their depth. They were about eight feet deep, and between twenty-two inches and two feet thick. I think it averaged two feet. Brick was furnished, and necessary materials for building the walls. The building was eighty-four feet by twenty-four, as laid down by a surveyor and M'r Nagle. He held one end of the line,
31 and I held the other. I find a variance of one and one-half inches from the building as it is. The first-story wall is sixteen inches thick. The second-story wall is twelve inches thick. I cannot give the h'ight of the walls. The first story is between thirteen and fourteen feet. The second story I don't remember. The reasonable value of the brick-work was $2,444.17, including labor and materials, at the rate of $17.00 per thousand for materials in the wall, at wall measure. The common price of wall measure, that year, was $16.00 per thousand, and $18.00 per thousand for small jobs. The lumber and labor, plaster, sidewalk, and excavation of cellar, were the other labors performed and materials furnished. The reasonable value of all these was, lumber, one thousand nine hundred and thirty feet, at $35.00 per thousand, $1,366.05; five thousand feet of flooring, $300.00; tin roof, $367.72; sidewalk, $198.00; twelve window-frames and sash, $120.00; two doors and frames, $48.00; cellar-frames, $20.00; one wooden front on Seventeenth street, $275.00; one partition and side-light platform, &c.,
32 $140.00; carving-work, $1,090.00; plastering, $230.00; one window-sill and cap in ivy, $12.00; painting, $175.00; setting iron front, $50.00; excavating cellar, $150.00; by private contract, $125.00; hardware, $78.00; clear two-inch and one and one-half inch lumber, $160.00. The amounts are reasonable values for labor and materials. The labor was performed and materials furnished at M'r Nagle's request. M'r Nagle took possession of the building and occupied it after it was finished. He occupied it the last of November, 1872. He occupied the cellar. I don't remember when he occupied the rest of it; about January, 1873, I think. He took the whole building off my hands before it was completed. He has been using and occupying it since that time. The reasonable value of the materials and labor was $7,341.19, as the building was taken off my hands. I don't know how much remains due and unpaid; I never could get M'r Nagle's account. As near as I could figure it up the amount due is over $2,000.00. M'r Nagle was attending to business on the corner opposite that building while the build-

33 ing was being constructed, and had charge of the construction of it all the time. I was working under his instructions.

Cross-examination:

I began making brick for this building in May. I commenced work on the building in June, 1872. I excavated the cellar at that time; I had an express contract with M'r Nagle in regard to the excavation of the cellar and amount to be paid for it; I believe the amount I was to be paid was $125.00. I think there was a writing in regard to it. I do not know but I receipted in full for the amount to be paid for excavating the cellar. (Witness here admits the signature to a receipt afterwards offered in evidence and marked "Exhibit A" to be his.) I do not know when I made the charge referred to on my memorandum-book. It was in 1872 I made the entries in the book, in the fall; I believe it was in the month of June the cellar excavation was completed for which the charge was made. The memorandum was not made at the time the work was completed or the contract made. I believe the memo-
34 randum in regard to the brick-work was made in October. I did not make the entry of a charge of brick-work from my own measurement of the brick work; I took the estimate of the masons with my own. My estimate was 137,165 brick; I have not got the measurements. Where it was a sixteen-inch wall we figured it at thirty brick to the foot; where it was a twelve-inch wall we figured it at twenty-two and one-half brick to the foot. The difference between this and my first estimate was in the cornice. The price of common brick-work in Cheyenne at that time was $16.00 per thousand; I was acquainted with the price. The brick-work in the court-house was put in at $18.00 per thousand during the summer, I believe; I took M'r Boughton's statement for it. I know of no actual transactions outside of this. I got $17.00 on Hellman's residence that year; I had an express contract for the whole building. The brick-work was not specially mentioned in the contract. The selling price of brick that year was $11.00 per
35 thousand. The cost of putting brick into the wall was $5.50 per thousand wall-measure, which is some less than a thousand. I put up M'r Housman's building that year. The price was $16.00 per thousand; I can't answer as to how many thousand briek there were in the building. We keep no account of how many thousand brick there are in the wall. The number of brick in the wall as I measured it is 143,743. One wall eighty-four feet long by fourteen feet six inches in h'ight and nine inches thick; one wall eighty-four feet long by fifteen and one-half feet high and sixteen inches thick; one wall eighty-four feet long by twelve feet five inches in h'ight and twelve inches thick; one wall eighty-four feet long by thirteen and three-fourths feet high and six inches thick; one wall twenty-four feet long by thirteen and one-half feet wide and twelve inches thick; one wall twenty-four feet long by thirteen feet five inches high and twelve inches thick; one wall one hundred and seven feet eight and one-half inches long by twenty-one feet three inches high and sixteen inches thick; one wall eighty-four feet long by one and one-half feet high and four inches thick. Joseph Sewers made the measurement for me.
36 I did not make them myself. My estimate is fifteen brick to the foot when the wall is nine inches thick. When the wall is six inches thick, I estimate eleven and one-fourth bricks to the solid foot. When the wall is four inches thick I estimate eight brick' to the solid foot. The wall four inches thick was half of an eight-inch wall built for two parties. I believe the measurement to be correct. I am not

positive as to the measurement; have no recollection how high the building was. I make my basis on one hundred and forty-three thousand seven hundred and seventy-four feet. I don't know how many thousand feet there were in the wall. At the completion of the stone-work I made the entry in my book in regard to the stone-work. I have no recollection when the stone-work was done. I made the entry of the stone-work after the entry in regard to the brick-work. The entry in regard to the stone-work was made at the time I rendered the account to M'r Nagle. There was another wall, ten feet four inches long by three
37 feet nine inches high and nine inches thick. One wall three feet three inches long by six feet high and nine inches thick. One wall fifteen and one-half feet long by five feet nine inches high by nine inches thick. Five chimneys, three and three-twelfths feet by two & ½ feet each. The eighty-four feet walls are eighty-three feet ten inches long, and the twenty-four feet walls are twenty-three feet ten and one-half inches long. I swear that the building is eighty-four feet long by twenty-four feet wide. The stone wall is eighty-four feet long by twenty-four feet wide. I do not know the thickness. There are two walls eighty-four feet long and two walls twenty-four feet long. The thickness is from twenty-two to twenty-four inches. I think it would average twenty-four inches. The hight is between seven and eight feet; I cannot state it more nearly. I charged, that year, $8.50 per cubic yard. We had a contract, several of them. There was no final contract made. There was and there was not a final contract in regard to the
38 stone-work between myself and M'r Nagle. There were ninety-six and three-fourths cubic yards of stone-work in the building. I took the length, breadth, and depth of the wall, and divided by twenty-seven. I don't remember what numbers I used in arriving at that conclusion. I don't know how much lumber I got at any one time and took there. I don't remember how much lumber I got from M'r Nagle. I got the amount from his brother John. I know the amount of lumber by measurement by myself and M'r Berry. I did this about the time of settlement with Houseman. I put all the lumber I got for the building into it. I did not use any lumber purchased for this building to build Hamma's stable. I can't tell what amount I got from M'r Nagle. The reasonable value of lumber was $35.00 per thousand. I got lumber from Nagle for $30.00 per thousand and charged him back $35.00 per thousand. There were several contracts at the beginning. We agreed several times on a plan and made
39 a contract accordingly, but the plan was changed, and the contract too. He requested me first to dig the cellar, and for that an express price was agreed upon, and is one of the items for which this suit is brought. I furnished the lumber on several requests from him. I think more than fifty. I have bills for lumber bought from Houseman. I bought lumber from him for other buildings that season. The bills show nearly all the lumber furnished for that building. I could not state of my own recollection, separate from the bills, how much lumber was used in the building. There was five thousand feet used in and around the building. The flooring was worth $50.00 and $55.00 per thousand. My knowledge in regard to the value of the timber is derived from M'r Houseman's book. I had the work done. There was an agreement in regard to it between Nagle and myself. I don't remember when it was made. I don't know that Nagle especially requested me to put on the tin roof or not. I don't remember what Nagle said to me. It was during the time of the erection of the build
40 ing, about the time it became necessary to put on the roof. M' Nagle requested me to put down the sidewalk after the stone-

work was finished. The price was $1.50 per feet. I don't remember how many feet there were. There would be thirty-six feet in front, on Ferguson street, and ninety-six feet on the side, on Seventeenth street. The reasonable value of the work was $1.50 per foot. There was a contract between me and the defendant to build the walk, at $1.50 per foot, which M'r Nagle agreed to pay me. The twelve windows and frames, and sash were furnished by me. There was no express contract between us in regard to it. I do not remember what he said, but I know he requested me to furnish them. There was a contract entered into in regard to the building, between M'r Nagle and myself. The market-value of the windows and frames and sash at the time was $120.00, the amount I charged. I judge from the cost of materials and labor necessary to make them. I can figure it up, but I won't. The windows were placed in the building. The doors were placed in the
41 building at M'r Nagle's request. The charge for doors includes frames. The price I charged was the market-value. I made the frames and bought the doors. One wooden front on Seventeenth street was agreed upon by M'r Nagle and myself in 1872. It was a separate and special request. I cannot tell when the request was made; about the time of finishing the brick-work, I think. I have no recollection of any price being agreed upon for this work. The front consists of the double doors, frames, and sash. I don't remember how many days it took. I don't remember whether I knew at the time of making the charge how many days it took. I made up the account in 1872. I made the entry in the book in 1872. Some of the materials used were worth $85.00 and some $100.00 per thousand. I don't know how much lumber was used. The partition consisted of studding, lathed and plastered on one side, and boarded up on the other, with a door in the center. It stood across the building in the lower story. I furnished the lumber to board it up on one side. I got an order from
42 Nagle to Dekay for this lumber. I never paid for that lumber. I supposed that he charged me with it. I was to charge him $50.00 if I put the partition in. It was not the agreement that if I did not put the partition in I was to give him credit for $50.00. I have charged for the partition upon the supposition that I furnished the material. I don't know that he ever paid for the lumber. I don't know whether there was a contract between me and Nagle that I should build the partition and furnish the material for $50.00 or not. By side lights I mean doors in front recess. I don't know how much of the charge is for them or for platforms. I don't remember the size of the platforms. I cannot give a statement of the number of days' work on the building. The charge, $1,090.00, for the work as it stands. I paid from $3.00 to $4.50 per day. I know who worked for me on the building; have not got their time. I have charged in addition for carpenter-work in the other items. The charge, $1,090.00, was for work on the building. The charge in the other items was for joiner-work. I had a contract to do
43 the plastering first; to do it for fifty cents per yard, hard finish, as it was done. I don't remember how many yards of plastering I did in that building. It was done in November, 1872, about. I believe the plastering was to be done at fifty cents per yard. Whatever he furnished me I received as pay for the work on the building. I don't know how many yards there were. Talbot and Burton did the plastering and received their pay from Nagle. The side door was put in at Nagle's special request. There was no price agreed upon. It was done in 1872. The painting was done by M'r Tuttle, and he was paid by M'r

Nagle. I swore in the suit between Nagle and Tuttle that I requested Tuttle to do the work as the agent of M'r Nagle, and I swear to it now. I don't know the actual cost of the painting. The painting was done by special arrangement. I don't remember when I made the charge for an iron front. The iron front was reasonably worth $50.00. I don't know how many men were employed, or how long it took, or the worth
44 of the materials. M'r Nagle furnished iron and glass for the building by arrangement. By this I mean the iron front and glazing and caps. He was to furnish the lumber in any event at $30.00 per thousand, or any material he wished. The one and one-half and two and one-half inch lumber was mostly used in sash in front and on corner. I don't know what amount of it was used. I measured it at the time. I made the charge after the lumber was furnished. I got the amount from Dekay's book. There were two planks twenty inches wide, two inches thick, and sixteen feet long. The first two were sixteen inches wide. I don't know how much lumber I got from Dekay or Housman. I got the charge for nails and hardware from Berry's book. I got the nails and hardware at several times during the erection of the building. I don't know how many nails were used. Hardware includes locks and iron-work. I don't know how many locks. I don't know when I made the charges on my book—whether in 1872 or 1873. I did not state that after I found that M'r Nagle would not keep his contract I
45 went home and made the charges in my book. The price for excavating the cellar was $120.00; and I have been paid in full. M'r Nagle paid for the stone. After having receipted in full for the work in excavating the cellar I charged $150.00 for the work, for the reason that M'r Nagle did not assist me according to agreement. (Receipt offered in evidence marked "Exhibit A."

Redirect examination:

The front and north side of the building were laid in stock brick. That was the difference between the cost of putting up Housman's building and this. When the wall is up the value of it is determined by measurement. There is some difference between the actual measurement and the number of bricks. The difference between our first estimate and the estimate of a brick-layer last fall was about six thousand. The estimates of the number of brick are made by wall measure. The memorandum in regard to the stone-work was made on the book prior to the memorandum in regard to brick-work. The contracts were verbal. We figured at several times on different buildings.
46 There was a portion of one of those contracts in this building. We never commenced work on a particular contract except an agreement in regard to the foundations of the building. There was no difference between the amount of lumber mentioned in the bills and the amount as shown by our measurement of the building. The wood furnished by Nagle was to be paid for in work by me, also groceries and money.

Testimony of George Craft.

The plaintiff, to further maintain the issues upon his part, produced as a witness GEORGE CRAFT, who, being sworn, testified as follows:

I reside in Cheyenne; I worked on the building for Rutledge; Nagle and Rutledge both controlled the work; Routledge let a contract to me and my partner. There were no plans for the building that I knew of or no change that I knew of. The plan was made as the work pro-

gressed, by Nagle; he was around there every day; the work was delayed by waiting for the front; we waited for the front two or three weeks; I don't know exactly how long; I don't know who fur-
47 nished the front; I was present at the time the brick-work was started; Nagle and Rutledge both were present and measured.

Cross-examination:

The contract was let to me and my partner for $5.50 per thousand for brick-laying. The contract was verbal. I don't know that there were no plans for the building. I know of no other cause for delay than the one I have mentioned. The brick was on hand all the time waiting. I don't know at what time it took place. The delay was in September.

The plaintiff rests, whereupon the defendant, by his counsel, filed with the clerk of said court the following motion, to wit:

TERRITORY OF WYOMING,
County of Laramie, ss:

In the district court, first judicial district.

THOMAS W. RUTLEDGE, PLAINTIFF,
vs.
ERASMUS NAGLE, DEFENDANT.

Motion to compel plaintiff to elect on which cause of action he
48 will proceed to verdict.

Motion to compel plaintiff to elect on which cause of action he will proceed to verdict.

And now comes the said defendant, by W. W. Corlett, his attorney, at the close of the evidence for the plaintiff herein, and moves the court now here to compel the said plaintiff to elect which of the several distinct causes of action shown by his said evidence he will proceed to verdict and judgment, because said evidence shows several distinct causes of action.

W. W. CORLETT,
Att'y for Defendant.

Which motion, after being argued for the plaintiff and defendant in this action by their respective attorneys, was, by order of the court, overruled, to which order the defendant excepted at the time said order was given.

Testimony of E. Nagle.

The defendant, to maintain the issues upon his part, produced as a witness ERASMUS NAGLE, who, being sworn, testified as follows:

I am the defendant in this action. I know the signature to this
49 note to be that of the plaintiff. (Note offered in evidence marked "Exhibit B.") I own the building spoken of. The erection was commenced in May, 1872, by myself. The excavation was commenced in May or the first of June, 1872. I let that contract to the plaintiff. The first contract was that he should excavate the cellar a sufficient depth for seven feet in the clear for $120.00, which I paid him. I had an arrangement with him some time before; he had a brick-kiln and wanted supplies; I wanted brick; I was to help him and take pay in

brick, if he did not build the building. There was no particular amount of wood specified. There was no arrangement at that time that he should do any work for me. It was determined then that I should build a two-story building. I made sketches of it, and asked M'r Rutledge to make estimates of it. He proposed to go on with the stone-work, at the rate of $7.00 per cubic yard, with the understanding that he was to have this if he did the stone-work alone, but not the rest. After
50 that was done I wanted brick. I was to have the first brick burned in the kiln, but do not know that I had any of them. I furnished some of the wood for burning them and supplies for men in the brick-yard. We then agreed on a sum for the entire work of the building. It was, after certain deductions, $5,530.00. He was to construct the cellar and sidewalk, to do the brick-work and stone-work, and furnish all the materials except iron and glass. He was to do more than he has done; to make cellar-windows, stairs, trap-door, and do more work above; he was to put on two coats of plaster. Anything different from plan was to be at my expense. The ceiling was to be three coats; he only paid for two. The stairway outside I intended to be iron, which would cost $100.00. I decided to have a wooden stairway. He never put up any; he owes me $30.00 on it. He was to make a partition across the store, twenty feet from the rear, and if that was not done I was to have a credit of $50.00. It was partially done. I made some sketches and diagrams. He agreed to make some
51 plans and draw up a contract, but did not do so; it was neglected from time to time; it was never done. The building was to be finished August 15th, 1872, by the original contract. It was to be two storys high, and eighty-four feet long, and twenty-four feet wide; the cellar was to be seven feet in the clear; the ceiling-joists were to be two inches thick by eight inches wide. We never varied much from our agreement. I have part of my plans. The work and materials were to be paid for as follows: He was in my debt, and all work was to be applied in payment of it and for supplies furnished. He made one window more than the contract called for. He made a wooden sill and cap covered with iron. I agreed to pay $20.00 for it. It was no part of his contract to plaster up stairs. He was to place the two doors. The windows were not cased nor to be cased. He was to lay the floor and make the scuttle-hole in the roof; he was to do all that he did do; he was to do the work in a workmanlike manner, and use merchantable materials. He placed the first floor too low, so that if continued in the same line it would have struck an inch below the door-
52 sill. He sp'ung the joists up by a screw in the front of the building. By this the beam supports the joists and the weight on the joists. He had the timbers and joists placed. I found that the room was not fourteen feet in the clear. It is about thirteen feet seven inches in some places and thirteen feet six inches in others. There is a variation of from one to one and one-half inches. In raising the joists with the jack-screw they were bent and some broken. He used rotten lumber, did not crown the joists, never straightened them, and left them in their natural state, crooked, some up and some down. M'r Housman's building was erected at the same time, and he used twelve-inch joists in the second-story floor, instead of fourteen-inch. He built the wall so that the brick-work could not rest on it, and then tore part of it down and set it out. The building is two inches shorter than it should be. I am uncertain about one sidewalk. I always understood there was a regular contract. He never said anything else. I wanted the privilege of put-

ting in some lumber. I was to have it at $30.00 per thousand.
53 He wanted to have it from me at the same rate. I have an account of the payments made for the work. This blotter is my book of original entries. The entries were made at the time of the transactions. We looked over the account of what he owed me before the work begun. He did not dispute the account. (The itemized bill of payments of money by the defendant to the plaintiff and to his order, and goods furnished by the defendant to the plaintiff and delivered on his order, is offered in evidence, marked "Exhibit C." The plaintiff admits that all the statements in the bill are correct except certain ones marked "*a*" in the bill.) M'r Widdop came in and bought goods by the verbal order of Rutledge, he being present; how much I do not know. I think he took the account he purchased up to Sept. 9th, 1872. Rutledge objected to the account and wished it opened with Widdop personally, which was done until September 21st, when the account was transferred to Rutledge, I think. Widdop worked for Rutledge during
54 this time, I think. After September 21st I have an order of $5.00 in favor of Widdop charged to Rutledge. The prices charged for goods sold to Widdop were ma'ket prices. June 20th, 1872, charge against Rutledge, per Cecil, cigars, $1.00; July 19th, July 22nd, one box of cigars. July 25th, car No. 4296. Wood was purchased from Charles Fellman and sold to Rutledge at $6.50 per cord, ten cords. Oct. 12, 1872, recording mortgage, $2.00. The mortgage was executed by Rutledge to me, and I paid for recording it. Dec. 14th, 1872, glass points and putty, fifty cents and fifty-five cents. I remember purchasing the articles from Converse and Warren, to use in building the store. I bought putty from Hurlbut Brothers to use in the same way. It was Rutledge's business to furnish it. In regard to hauling away the old brick, I remember nothing but that the entry is made December 28th, 1872. Putty to be used in the building. I purchased it. In regard to the trap-door I remember nothing. The nails and screws were for the trap-door. Jan. 23rd, 1873, bill of John Corkish. I employed
55 him to put doors and windows in cellar, and charged it to Rutledge as being part of his work. In regard to the car of stone, I have no knowledge of any one car of stone being charged there. Charles Fellman furnished stone to Rutledge for the building. I presume that I agreed to pay for the stone, as I did it. The bill for twenty-seven carloads of stone is in my handwriting, and was correct at the time it was made. There were two large stones got out for door-sills on Seventeenth street, which Rutledge did not use. I think the whole stone were bought in my presence. I don't know whether these stone were included in the stone I paid for or not. I paid expense bills for stone for Rutledge, for stone shipped to Harper & Housman. I opened business in the building January 1st, 1873. I had previously stored goods in the cellar by Rutledge's permission, about October, 1872. I have measured the brickwork and stone-work, and put down the figures at the time. The number of brick, according to my calculation, is one hundred and thirty-six thousand eight hundred and sixty-six. I was with the parties
56 who measured it for Rutledge. One wall eighty-three feet ten inches long contains two thousand brick. There are no brick between the iron front and the opening on Seventeenth street. This job was the only one I contracted for. Rutledge said it was worth $16.00 per thousand. He said it was low. There is a base or putting under the stone wall thirty inches in width, nine inches high, as the projection. Onehalf of the partition between me and Housman, eighty-four feet long, six feet three inches high, twenty-two inches thick. The brick is not aced-on the outside. One side-wall, eighty-four feet long, six feet three

inches high, eleven inches wide. The end-wall is twenty-four feet long, six feet three inches high, twenty-two inches thick. The number of cubic yards is eighty-three and twenty-three twenty-sevenths yards. It was worth $7.00 per yard. The total value is $586.00. The value of the brick-work at $15.00 is $2,052.99, less $42.50. I sold lumber to him for $30.00 per thousand, the same as paid. The amount of plain lumber in the building is fourteen thousand seven hundred feet. Floor-
57 ing is four thousand five hundred and sixty-four feet. There are two floors one inch thick. I can't tell in regard to the tin roof; the dimensions of it are twenty-four feet by eighty-four feet. My estimate is twenty and six-tenth squares in the roof. The sidewalk could be built that year for not to exceed $1.25 per foot linear measure. I paid the bill for making the wooden front on Seventeenth street to Martin Alber. More lumber was put in it than was necessary. The lumber was the hard-wood sills, the plain casings, windows, and doors. It was not finished on the inside. The cost of making it was $40.00. Glass was furnished by me. The wooden front consists of four hundred and fifty feet of clear lumber, one hundred and twenty feet of staff mouldings, and fifty feet of mouldings. The partition was part of the building. In case he did not put it in I was to have $50.00. I don't know what the side-lights were. The front room on the first floor was plastered with two coats. Rutledge gave an order on me for the whole amount. The third coat was never charged to Rutledge. The
58 cost of the plastering was $182.50, as the order shows. The circle and third coat were not provided for in the agreement with Rutledge. The painting was included in the original contract. Mr. Tuttle did the painting. The painting and glazing came to $116.00. I paid that amount. Rutledge testified that he employed Tuttle to do the work for me at my request. The value of the use of the store during the time I was kept out of it was $100.00 per month. The room which was not finished was not plastered or painted on the inside according to agreement. The cost of the plastering would be $112.00. The casings, unfinished, $15.00. The base boards, unfinished, fifty-five feet at twelve cents per foot. The painting was worth $15.00. The trap-door leading into the cellar was not built according to agreement. These are the plans in reference to which I spoke before. There were no stairs to go to the cellar. The cost of putting in the door by M'r Corkish, and the cost of materials, was $37.45. There were two pairs of stairs I did not get, and some goods which I did get were not merchantable.
59 The difference in value between the building as it should be and as it was, by reason of the floor, was $500.00. Rutledge did not furnish plans as he agreed. There were no anchors in some places. The trimmers were all too weak. Two of the joists gave way. I never had any conversation with Rutledge since the completion of the work in regard to settlement. He never asked for my account. He made one window more than he agreed to at first, for $20.00.

Cross-examination:

I don't know the date of commencing the work. I am not certain that I assisted in the survey. I gave no directions that I remember of, when the foundation was laid, to the workmen, except when I found an error. The stone was furnished by Rutledge. I estimate the stone-work at eighty-three and twenty twenty-sevenths yards. Our contract was verbal, but it was to be reduced to writing. He had about two pages written, and carried them with him after the work was begun. He could put in the iron for $800.00, or I could put it in and pay him

$800.00 less. The first story was to be fourteen feet high in the
60 clear. Seven hundred and twenty feet of lumber were joists, which I furnished. These joists were placed where the inferior joists were not. I do not know of any joists in the four thousand three hundred and thiry feet of lumber. Some of the joists were rotten and unmerchantable. I objected to three on the lower floor and all on the upper floor. I don't know where they came from. My recollection is that the joists on the second floor were purchased by Rutledge to be put on Housman's building, but were put on to mine. I may have seen the joists put in. I made a minute of the amount to be paid Rutledge for the whole work in my book. I don't remember how the front was purchased. I can't state who wrote the letter ordering the front. Between the floor and plastering is thirteen feet six inches and thirteen feet seven inches, on first floor. It is thirteen feet six inches in the middle, and thirteen feet seven inches on the side. I think it was part of Rutledge's business to order the columns for me. It was not my place to have the iron there at any specific time. I cannot say when I got it there. There is
61 now an inch-board under the end of the beam. I made no change in the stone wall at the time of its erection, except to remedy a defect. I am willing to let the bit go at three dollars. I talked about putting up an iron stairway when I talked about putting up the building. The wood or iron would cost me the same price. The charge of September 21st of $14.35 does not include the former charges against Rutledge per Widdop, or any of them. I had written orders and verbal orders to sell goods to Widdop by Rutledge. My recollection is that Rutledge got a statement of the account of Widdop when he ordered it charged up to him. M'r Cecil had an interest in the brick-yard. He bought the cigars and tobacco, and ordered it charged to Rutledge. I believe that he had authority to do this. I had no authority to sell cigars to him on Rutledge's account. Rutledge never made objection to it. I can't say specifically whether removing the rubbish was included in the contract between me and Rutledge or not. The sash in the bill of John Corkish were for the cellar-windows.
62 It was part of Rutledge's original contract to provide doors and windows for the cellar. I used the building before the first of January by permission of Rutledge. I agreed to pay for the iron and glass for the front, and did so. I consider my damage $500.00 by reason of the building not being built as it should be. There was an agreement that he should put in iron anchors. I do not think that the building was anchored by the connection of the joice on the second floor. My estimate for the tin roof was twenty and six-tenths squares, worth $15.00 a square.

Redirect examination:

M'r Cecil ordered goods to be sent to the brick-yard for M'r Rutledge.

Recross examination:

When any person besides Rutledge bought goods, it was usually marked on the book who bought them.

Testimony of John Corkish.

The defendant, to further maintain the issues on his part, produced as a witness JOHN CORKISH, who, being sworn, testified as follows:

I have resided in Cheyenne five years; I know the parties and
63 building and the sidewalk built in 1872. The market-value of putting down sidewalks that year was in some cases $1.25 per

foot, and in some cases $1.00. The market-price for lumber in small lots was $35.00 per thousand, and in large lots $30.00 per thousand. The sidewalk is ninety-six feet on one side and twenty-four feet on the other and twelve feet additional. I have measured the building in the fall of 1874. It was eighty-three feet ten and one-half inches long, and twenty-three feet ten and one-half inches wide. The lower room in the front part is thirteen feet six inches high; farther back it is thirteen feet seven inches. One joist varied two and one-half inches in different places. In wall-measure a certain number of brick are counted to the square foot. The windows are counted in the wall. The opening would be subject to the count if the columns did not extend the whole height of the story. I calculate there are one hundred and thirty-four thousand brick in the building according to wall-measure after completion. The value of the brick-work in the building that year was from $15.00
64 to $17.00 per thousand. I think M'r Nagle's wall would be worth $16.00 per thousand that year. The stone-work was worth $8.00 per cubic yard for such a job as this. I measured lumber in the building. There is fifteen thousand five hundred feet of rough lumber, and four thousand seven hundred feet of flooring. The wooden front consists of four openings, two windows, two doors, one circle head. The value of putting it in would be $140.00 to a person not furnishing the glass. The partition extended from floor to ceiling in first story; putting in partition without plaster would be worth $22.00; putting the side-lights in without glass would be worth $25.00. The platform and windows in addition $5.00. The extra window put in by Rutledge was worth $5.00. I estimate the nails and hardware in the building at $75.00. The carpenter-work, not including certain items, as sidewalk, &c., was worth, in my opinion, $350.00. The cellar-frames were worth $6.50; setting the iron front was worth $30.00. I have examined the joist on the first and second floors as far as exposed. Three of them are defective. They are affected with dry-rot and have large knots
65 in them. The lower floor within eight feet from the front inclines upward toward the front. In one place a header is split On the second floor there are two or three joists not framed, but cut and spiked so that there is no support. The twelve window frames and sash without glass in the second story would be worth $6.50 each. I was acquainted with the value of painting and plastering that year. The reasonable value of all the work and materials named that year, including the sidewalk and excavating cellar, was $5,500.00.

Cross-examination:

The estimate of $5,500.00 does not include the tin roof. The value of the tin-roof was $15.00 per square for nineteen and one-half squares. The place where the joists varies two and one-half inches is eighteen feet from the rear end of the building on the first floor. The floor is level on top of it. The joist varies because it is raised too high. The other joists vary from one and one-fourth to one and one-half inches. One side the building is higher than the other. It is not caused by settling of the building. I measured these joists be-
66 low. I did not measure between the floor. I did some brick-work that year. I superintended the erection of Recreation Hall. The cost of putting the bricks in the wall was $14.00 per thousand. There are a few hundred bricks over one hundred and thirty-four thousand in this building by wall-measure. I measured five chimneys and the wall under the iron front. The building is about thirty-three feet high

from the stone-work. It would take a man about three-fourths of a day to put up studding for partition. The carpenter-work would take about seventy-five days at not to exceed $4.00 per day, $300.00. The dry-rot extends about one inch into the joist. Where lumber exceeded twenty feet in length the price was $1.00 per thousand in addition. The price of putting on the tin roof was $15.00 per square that year. I know, because I superintended some work of that kind.

Testimony of E. Tuttle.

The defendant, to further maintain the issues on his part, called as a witness J. E. TUTTLE, who, being sworn, testified as follows:

67 I am a painter by trade and have been engaged in that business six years. I know the parties and building. I did most of the painting. I was to give it two coats, the window-frames, shelves, &c. M'r Rutledge engaged me to do it for Nagle at twenty-eight cents per yard. The bill amounts to $90.12, which was a fair market-value for the work; $12.00 for glazing. M'r Nagle paid me for the work. I also glazed the windows up-stairs. It came to $10.80, a reasonable value. There was some priming done first. I do not know where it was done, either on sash or window-frames.

Cross-examination:

I think the painting on the iron front is included. I don't remember making a contract with Rutledge to do the whole work for $120.00. I did not paint the roof.

Testimony of R. H. Dawson.

The defendant, to further maintain the issues on his part, produced as a witness RALPH H. DAWSON, who, being sworn, testified as follows:

I have resided here about five years. I am a carpenter by trade, and have been engaged in that business five years. I know the parties and building. I helped build it under M'r Rutledge's direction. I
68 worked on it in 1872. I worked on the front, helped put on the joists, roof, ceiling, floor, and roof-boards. Some of the joists were very poor, broken, and rotten. In the second floor they were put in and left for some time and crooked. They were straightened out the best possible way before putting on the floor. I broke one joist entirely in two and cracked another. They were left in with a timber nailed on. I think they were not put in strong enough. The joists were not of first-class quality.

Cross-examination:

I don't know where Rutledge got the joists. M'r Nagle was around the building at the time. I don't think M'r Nagle was there when we nailed the broken joist. I don't think it was as good as if the joist had never been broken. I don't know whether I called Rutledge's attention to it or not. I spoke to M'r Rutledge about M'r Nagle's speaking to me about the work.

Redirect-examination:

M'r Nagle did find fault at times with the work. We raised the lower floor some in front.

Testimony of Solon Burgess.

69 The defendant, to further maintain the issues on his part, produced as a witness SOLON BURGESS, who, being sworn, testified as follows:

I reside in Cheyenne, and am engaged in brick making. I know the parties and building. I am an architect and builder, and have been for twenty years. The value of getting up plans and specifications for that building would be $150.00.

Cross-examination:

The plans and specifications are for the benefit of both parties, but more particularly for the owner of the building. The party getting the work done gets the plans and specifications. I never knew of a case where the contractor furnished plans & specifications.

(The bills of materials paid for by M'r Nagle, referred to in Exhibit C, are offered in evidence.)

The defendant, being recalled, testified as follows: I know the signatures to these expense bills. I paid the amounts mentioned therein.

Defendant rests.

Testimony of John Castello.

The plaintiff, to rebut the evidence of the defendant, produced
70 as a witness JOHN CASTELLO, who, being sworn, testified as follows:

I reside in Cheyenne, and am a carpenter by trade, and have been one for sixteen years. I know the building. I measured the length of the building to-day. I have partially examined the building. I made an examination of the joists in the cellar. They are first class. I saw none rotten. I thought they were a first-class set of joists.

Cross-examination:

I examined them with a candle this morning.

Testimony of Henry Housman.

The plaintiff then called as a witness HENRY HOUSMAN, who, being sworn, testified as follows:

I know the parties, and knew the building when it was erected. I bought the front myself and paid for it October 29th, 1872. I received it a few days—8 or 10—before I paid for it. I sold the tin for the roof of the building to M'r Rutledge.

Testimony of T. W. Rutledge.

The plaintiff, being recalled, testified as follows:

I had no specified contract with the defendant as to the amount
71 to be paid me for this building. I was to draw up plans when he drew up specifications. I got two pages of specifications, but they did not suit him. M'r Nagle never drew a specification up, and I never drew up a plan. He furnished me four car loads of wood. I am not positive as to the number of cords. I never ordered Widdop to buy goods on my account without a written order. I assumed $5.00. I never ordered Cecil to buy goods for himself, but only for the brick-yard. There never was a time set for completing the building. It was

completed the latter part of December, 1872. We talked of having the first story of it fourteen feet high, as M'r Nagle wanted it. Housman wanted his thirteen feet high, but said he was willing to make it thirteen feet six inches. I told the men to put in the joist at thirteen feet six inches. The columns ordered were thirteen feet. The joists were put up thirteen feet six inches. The columns came same h'ight, 13 f't 6 inches. We had to raise joists & level back. Nagle was present and saw it. Some of the joists were broken by the jack-screw. I put in an extra joist to satisfy M'r Nagle; so Nagle got the broken joist
72 and a good one besides. The joists were twenty-four feet long on the second floor. I put in the joists from the pile in both buildings. M'r Nagle was present and said I was putting in better joists in Housman's building than in his. He wanted the best in his building. I took them just as they came for both. The joists for both came together. He made no objection to the size of the joists. I never made an agreement with Nagle in regard to recording a mortgage. The putty and glass from Hurlbut Bro's was for windows that I had nothing to do with. I never promised to haul away the rubbish. I never used the stones which he refused, for the reason that he did not have them cut. I told him I would charge $130.00 for putting up a wooden stairway, or an iron one for $30.00 if he furnished the iron. I left men to finish the stairway into the cellar and he was to pay them. M'r Nagle offered to pay half my expenses if I would go to S't Louis and buy the iron front. There was no conversation in regard to anchors; he left it to me. It was anchored by iron anchors. There is one rotten and decayed
73 joist; not where M'r Nagle said it is. I spiked some timber along with it. There is a difference of opinion in regard to headers and trimmers. All that the floor requires to-day is a man with a jack-screw to block it up. The note has been paid. When there was money enough due me on the work to pay the note I directed the money to be applied in that way.

Cross-examination:

This was soon after the note became due. I have sued for the same work and materials I applied on the payment of the note. I owe him $210.00, but no interest. He had no plan upon which the building was built. I kept an account of the number of cars of wood I got; it was only four. I got an order for the car of wood but did not get the wood. I don't recollect the date. I got the stone at M'r Nagle's. I agreed to assume $3.00 of Widdop's indebtedness to Nagle, but told Nagle not to trust any one on my account without a written order. Cecil had a right to order goods for the brick-yard. I don't know whether the headers and trimmers were mortised or not.

Redirect examination:

74 I never saw the account of Nagle until I saw it in court.
Plaintiff rests. Testimony closed.

Which said testimony was all the evidence introduced on the trial of this cause by the parties plaintiff and defendant.

Exhibit A.

CHEYENNE, *June 1st*, 1872.

Rec'd of E. Nagle one hundred and twenty dollars, to apply in full for excavation of cellar on lot 1 & 2, block 391, cor. of 17th & Ferguson streets, to be 24 x 84 feet square, 6 feet deep or thereabouts, sufficint for a cellar 7 f't in the clear below the city grade.

T. W. RUTLEDGE.

Exhibit B.

$210.00.]

CHEYENNE, *June 24th*, 1872.

Thirty days after date I promise to pay to the order of E. Nagle two hundred and ten dollars, interest after maturity, at rate of 3 % per month until paid, value received.

75 T. W. RUTLEDGE.

Instructions given to jury on motion of plaintiff's counsel.

The court thereupon, on motion of the plaintiff's counsel, instructed the jury as follows:

1. The debtor who owes his creditors money on distinct accounts may direct his payments to be applied to either as he pleases. If the debtor makes no appropriation, the creditor may apply the money as he pleases.

To the giving of which instruction the defendant by his counsel then and there duly excepted.

2. If you find in this case that Rutledge was prior to the commencement of the building indebted to the defendant on two or more accounts, he had a right to apply the payments made to either as he chose in the absence of an appropriation by Nagle. And if he applied his payments to the note, it would be sufficient payment to support the plea of payment by plaintiff in the reply.

To the giving of which instruction the defendant by his counsel then and there duly excepted.

3. The defendant's claim for damages is an affirmative one, and
76 the burden of proof rests upon him to establish the existence of a special contract, the breach of that contract, and the actual damage created thereby.

The court then, upon motion of the defendant's attorney, gave the following instructions to the jury:

1st. This is an action brought by the plaintiff, Rutledge, against the defendant, Nagle, to recover a certain sum of money from Nagle for certain work alleged to have been done by Rutledge at Nagle's request, and for certain materials alleged to have been furnished by Rutledge at Nagle's request in the erection of a certain building for said Nagle. The plaintiff claims for the reasonable value of the work and the materials. You are instructed that the burden of proof is upon M'r Rutledge to entitle him to recover, and that unless he has proved all the material allegations of his petition by a preponderance of evidence, that is, by a greater weight of evidence than is produced by the defendant, then you should find for the defendant as to any matter disputed by the defendant.

77 2nd. The plaintiff sues for the reasonable value of certain materials alleged to have been furnished by him to the defendant, Nagle. Now, before you can find for the plaintiff, Rutledge, you must be satisfied that the plaintiff has proved by a preponderance of evidence, first, the actual amount of work so done and materials furnished; second, the reasonable market-value of the work so done and the materials so furnished. And if the plaintiff upon either of these two propositions has not produced a preponderance of evidence, then you will find for the defendant.

3rd. If the plaintiff, Rutledge, procured one Tuttle to do the painting upon the building in question, he, Rutledge, acting at the time only as the agent of the defendant, Nagle, in that transaction, then the plaintiff

in this action can recover noting in this action for the charge which he makes for the painting so done by said Tuttle.

4th. The plaintiff in this action having sued simply for the reasonable value of the work done and materials furnished, he can recover
78 only the reasonable value of the same in this action. The plaintiff cannot recover what it may have cost him to do the work or furnish the materials; he can only recover their reasonable value at the time they were furnished, no matter what the cost may have been to him.

5th. The greater part of the account of the defendant in this action alleged to have been applied in payment of which the defendant alleges would become due for the erection of defendant's building under a special contract for the erection of the same is admitted by both parties. Whatever you may find as to the plaintiff's claim, you will allow the defendant upon his account the amount so admitted, and as to the balance of the defendant's account, if the same has been proved with the same amount of evidence which is required to establish the plaintiff's demand, then such balance should be allowed by you in favor of the defendant also.

6th. The defendant alleges that the plaintiff was to construct the building in question and furnish all the materials therefor except the
79 glass and iron front for $5,530.00, said building to be done in a certain time and in a certain manner. If you so find from the evidence that such a contract was made between the parties, then you can allow the plaintiff only the said sum of $5,530.00 for said work and materials and $20.00 for extra work which the defendant admits. And if you further find from the evidence that the plaintiff did make such a contract with the defendant and then failed to do the work or furnish the materials as the contract required, then you will allow the defendant as a deduction from said contract-price such damages as he has proved he has sustained, unless the delay was caused by the defendant.

7th. If the plaintiff failed to comply with any contract he made in respect to the erection of said building for the defendant, then this defendant is entitled to recover from the plaintiff such damages as he has proved to result from such failure on the part of said plaintiff, unless the failure of plaintiff to comply with his contract was caused by the defendant.

9th. It is not necessary that the contract, if there was one, be-
80 tween plaintiff and defendant should have been in writing; it is sufficient if there was a proposition made by one party for a certain price and accepted by the other.

Instructions requested to be given by defendant's attorney which court refused to give.

The defendant by his counsel also requested the court to give the following instruction to the jury:

8th. If you find from the evidence that any portion or portions of the demand sued for in this action accrued or became due from the defendant to the plaintiff upon express contract or contracts which were entirely independent of and disconnected from the other portion or portions of the demand sued for, then you can find a verdict only for a single one of such distinct demands.

Which said instruction the court refused to give; to which refusal the defendant, by his counsel, then and there duly excepted.

Instructions given to jury on motion of court.

The court on his own motion gave the following instructions to the jury:

GENTLEMEN OF THE JURY: This action consists principally of
81 questions of fact for your consideration. There are very few questions of law involved in it. Hence the labor devolves almost entirely upon you to determine the rights existing between the parties.

The plaintiff's petition sets out that def't employed the pl'ff to erect a store-house for him on the corner of Ferguson & 17th streets, in Cheyenne; that there were no specific terms agreed on between them, so far as the amount to be paid for its construction was concerned, although he admits that certain portions of the building were constructed under special stipulations, but alleges that the defendant failed to comply with his part of those stipulations; hence he (pl'ff) is released from such special contracts, and therefore presents his account for materials furnished and for work and labor. Now, if the evidence satisfy you that the building was to be erected in the manner and upon the terms claimed by plaintiff, then you are to find whether the charges made by pl'ff are or were the reasonable value of such materials and labor at the time
82 they were furnished; and, if so, then your verdict should be on that basis, deducting from the amount thus found the several sums shown by the evidence to have been paid by defendant, before, during, and since the construction of the building.

On the other hand, the defendant has set up in his answer a general denial, a specific contract, payment in full, and a counter-claim.

It will therefore devolve upon you to determine whether there was an express contract; if so, what was the amount to be paid, was the work done according to the terms of the contract, how much has been paid, and if the work was not done as agreed to be, whether the def't was damaged by reason of plff's failure to complete the work within the time specified in the contract, by reason of defective materials or workmanship. And you are to pass upon the question of disputed amounts claimed to have been paid by def't.

You should also consider, if you find that there was a contract to complete the building within a definite time, whether the delays com-
83 plained of were occasioned by the defendant's failure to furnish any materials which he had stipulated to furnish, or in any manner was the cause of delay. Having come to a conclusion on all these points, you are then to find from the evidence how much is due to either party, and find to which one, and return your verdict accordingly. The form of your verdict should be in about the following order:

THOMAS W. RUTLEDGE }
vs. }
ERASMUS NAGLE. }

We, the jury in the above entitled case, find for the , and assess his damages at $

Foreman.

CHEYENNE, *June* , 1876.

Portion of instructions given to jury on motion of court, to which defendant excepted.

The defendant, by his counsel, duly excepted to the giving of the fol-

lowing portion of the instructions given by the court upon his own motion at the time said instructions were given:

84 "The plaintiff's petition sets out that def't employed the pl'ft to erect a store-house for him on the corner of Ferguson & 17th streets, in Cheyenne; that there were no specific terms agreed on between them, so far as the amount to be paid for its construction was concerned, although he admits that certain portions of the building were constructed under special stipulations, but alleges that the def't failed to comply with his part of the stipulations; hence he (pl'ff) is released from such special contracts, and therefore presents his account for materials furnished and for work and labor.

"Now, if the evidence satisfies you that the building was to be erected in manner and upon the terms claimed by plaintiff, then you are to find whether the charges made by pl'ff are or were the reasonable value of such materials and labor at the time they were furnished; and, if so, then your verdict should be on that basis, deducting from the amount thus found the several sums shown by the evidence to have been paid by defendant before, during, and since the construction of the building.'

85 *Verdict of jury.*

The jury thereupon retired, and after deliberation found as follows:

THOMAS W. RUTLEDGE }
vs. }
ERASMUS NAGLE. }

We, the jury in the above-entitled case, find for the plaintiff, and assess his damages at $939.63, nine hundred and thirty-nine dollars and sixty-three cents.

C. J. MASTEN,
Foreman.

CHEYENNE, *June 19th*, 1876.

Endorsed on the back as follows: "Verdict. Filed June 19th, 1876. J. W. Bruner, clerk."

At the same time was filed another paper, in the words and figures following, to wit:

Hon. Judge FISHER:

SIR: We respectfully ask your honor for information in re-
86 gards to interest being added in case we find judgment against either party.

Your', respectfully,

C. J. MASTEN,
Foreman.

Papers filed with verdict of jury.

It is agreed by and between the parties that interest need not be computed.

J. W. FISHER, *Judge, &c.*

Return this paper with the verdict.

Must we find with or without interest?

By agreement of the parties you are to find without interest.

J. W. FISHER, *Judge, &c.*

Return this paper with your verdict.

Filed June 19th, 1876.

J. W. BRUNER, *Clerk.*

The defendant thereafter, on the twenty-second day of June, A. D. 1876, and within three days after the date of said verdict filed, with the clerk of said court a motion in words and figures as follows, to wit:

87 *Motion for a new trial.*

TERRITORY OF WYOMING,
County of Laramie, ss:

In the district court, first judicial district.

THOMAS W. RUTLEDGE, PLAINTIFF,
vs.
ERASMUS NAGLE, DEFENDAN.

Motion for a new trial.

And now comes the said defendant, by W. W. Corlett, his attorney, and moves the court now here to vacate the verdict of the jury heretofore rendered in this case, and to grant a new trial, for the following reasons:

1. Because said verdict is not sustained by sufficient evidence.
2. Because said verdict is contrary to law.
3. Because the court erred in overruling the motion of said defendant at the conclusion of the evidence for said plaintiff in the case, to compel the said plaintiff to elect on which of the several causes of action shown by his evidence he will proceed to verdict and judgment.
4. Because the court erred on the trial of this cause in refusing to give to the jury instruction 8, as requested by defendant.

88 6. Because the court erred in giving instruction 1, as requested by plaintiff.

7. Because the court erred in giving to the jury instruction 2, as requested by plaintiff.

8. Because the court erred in its instructions to the jury commencing with the words "the plaintiff's" on the 17th line of the first page of the instructions given by the court, and ending with the word "building" on the 18th line of the 2nd page of said instructions.

W. W. CORLETT,
Attorney for Defendant.

Which motion was, after argument for the parties plaintiff and defendant, by order of the court overruled, to which order the defendant, by his counsel, duly excepted at the time said order was made.

And thereupon, on the 21st day of July, 1876, being one of the regular days of the May A. D. 1876 term of said court, the court rendered judgment for the plaintiff against the said defendant upon the

89 verdict aforesaid for the amount therein found for plaintiff, and the costs of action.

And the following entry was made of record upon the journal of said court, to wit:

Judgment of court.

May term, 1876.

FRIDAY, *July 21st*, 1876.

THOMAS W. RUTLEDGE
vs.
ERASMUS NAGLE. } No. 341.

The court having had under consideration the motion for a new trial in this cause, and the argument of counsel thereon, and being now fully advised in the premises, it is now ordered and adjudged by the court that said motion be, and is hereby, overruled, to which ruling of the court in so overruling said motion said defendant, Erasmus Nagle, by his counsel, W. W. Corlett, esq., then and there excepted. And thereupon the plaintiff, Thomas W. Rutledge, by his counsel, E. P. Johnson and Thomas J. Street, esq'rs, move the court for judgment on the verdict herein rendered, which said last motion is hereby sustained.

90 Wherefore it is now considered and ordered by the court that the said plaintiff, Thomas W. Rutledge, have and recover from the said defendant, Erasmus Nagle, the sum of nine hundred and thirty-nine and $\frac{63}{100}$ dollars, and the costs of this action, taxed in the sum of $, and that execution issue therefor.

J. W. FISHER,
Judge First Judicial District.

And now on this fifth day of August, A. D. 1876, being one of the regular days of the May A. D. 1876, term of said district court, this bill of exceptions is signed and sealed in open court by the judge thereof, and it is ordered that this bill of exceptions be made a part of the record in this cause.

J. W. FISHER, [SEAL.]
Judge, &c.

Endorsed on the back as follows: "Thomas W. Rutledge vs. Erasmus Nagle. Bill of exceptions, &c. Filed August 5th, 1876. J. W. Bruner, clerk."

Authentication of record.

TERRITORY OF WYOMING,
County of Laramie, ss:

91 I, J. W. Bruner, clerk district court within and for said county, in the Territory aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the amended petition, answer, reply, bill of exceptions, with all papers therein incorporated, verdict, and journal entries of jury, and judgment in the cause entitled Thomas W. Rutledge vs. Erasmus Nagle, so full and entire as the same remain now on record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 16th day of August, A. D. 1876.

{ FIRST DISTRICT COURT, LARAMIE COUNTY, WYOMING TERRITORY. } J. W. BRUNER,
Clerk District Court.

Endorsed on the back as follows, to wit: "Supreme court. Erasmus Nagle, pl'ff in error, vs. Thomas W. Rutledge, def't, in error. Transcript. Filed August 18th, 1876. J. W. Bruner, clerk supreme court."

92 And thereafter, at the regular March term, A. D. 1877, of the supreme court of the Territory of Wyoming, the following proceedings were had in said case on the respective days hereinafter mentioned, in the words and figures following, to wit:

March term, 1877.

MONDAY, *April 16th*, 1877.

ERASMUS NAGLE, PL'FF IN ERROR,
vs.
THOMAS W. RUTLEDGE, DEF'T IN ERROR. } No. 95.

Comes now the said plaintiff in error, by his counsel, W. W. Corlett, esq., and the said defendant in error, by his attorneys, E. P. Johnson and Thomas J. Street, esq's, and the hearing of this cause is proceeded with and concluded. Whereupon the argument of said counsel and their briefs of authorities cited by them having been presented to the court, the same, as well as the record herein, is now taken under consideration by the court.

March term, 1877.

THURSDAY, *April 19th*, 1877.

93 ERASMUS NAGLE, PL'FF IN ERROR,
vs.
THOMAS W. RUTLEDGE, DEF'T IN ERROR. } No. 95.

The court having had the argument of counsel, authorities cited by them, and record in this cause under consideration, and being now fully advised in the premises, wherefore it is now considered, ordered and adjudged by this court that the judgment of the court below be, and the same is hereby, in all respects affirmed. And it is further ordered by the court that a writ of procedendo issue out of this court directed to the first district court, authorizing said district court to enforce its judgment therein given. And it is further ordered by the court that the said defendant in error, Thomas W. Rutledge, have and recover of the plaintiff in error, Erasmus Nagle, his costs in this behalf expended, taxed in the sum of $10.00, and that execution issue therefor.

94 Thereafter, to wit, on the 18th day of June, A. D. 1877, there was filed in the clerk's office of said supreme court an affidavit of plaintiff in error as to value of matter in dispute in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss.:*

In the Supreme Court of the United States.

ERASMUS NAGLE, PLAINTIFF IN ERROR,
vs.
THOMAS W. RUTLEDGE, DEFENDANT IN ERROR,

Error from the Supreme Court of the United States to the supreme court of the Territory of Wyoming.

TERRITORY OF WYOMING,
County of Laramie, ss.:

I, Erasmus Nagle, of said county, being first duly sworn, on my oath

do depose and say I am the plaintiff in error in the above cause, and that the value of matter in dispute in the above cause, exclusive of costs, exceeds the sum of one thousand dollars.

ERASMUS NAGLE.

Subscribed and sworn to before me this 18th day of June, A. D. 1877.

FIRST DISTRICT COURT, LARAMIE COUNTY, WYOMING TERRITORY.

J. W. BRUNER,
Clerk District Court.

Endorsed on the back as follows, to wit: "Erasmus Nagle vs. Thomas W. Rutledge. Affidavit of plaintiff in error as to value of matter in dispute. Filed June 18th, 1877. J. W. Bruner, clerk supreme court."

And on the last said day there was filed in said court a bond upon writ of error, and for supersedeas, in the words and figures following, to wit:

Supreme Court of the United States.

ERASMUS NAGLE, PLAINTIFF IN ERROR,
vs.
THOMAS W. RUTLEDGE, DEFENDANT IN ERROR.

Know all men by these presents that we, Erasmus Nagle, as
96 principal, and Morton E. Post and Charles F. Miller, as sureties, of Cheyenne City, in the Territory of Wyoming, are held and firmly bound unto Thomas W. Rutledge, in the sum of two thousand five hundred dollars, to be paid to the said Thomas W. Rutledge, his executors or administrators. To which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 18th day of June, A. D. 1877.

Whereas the above-named Erasmus Nagle hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Wyoming:

Now, therefore, the condition of this obligation is such that if the above-named Erasmus Nagle shall prosecute his writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

ERASMUS NAGLE. [L. S.]
97 MORTON E. POST. [L. S.]
CHARLES F. MILLER. [L. S.]

TERRITORY OF WYOMING,
County of Laramie, ss:

Morton E. Post, being first duly sworn, on his oath deposes and says he is one of the sureties to the above obligation; that he is a resident of said Territory, and that he is worth the sum of two thousand five hundred dollars beyond the amount of all his debts, exemptions, and liabilities, and that he has property liable to execution in said Territory equal to the said sum of two thousand five hundred dollars.

MORTON E. POST.

Subscribed and sworn to before me this 18th day of June, A. D. 1877.
[SEAL OF COURT.] J. W. BRUNER,
Clerk District Court.

TERRITORY OF WYOMING,
County of Laramie, ss:

Charles F. Miller, being first duly sworn, on his oath deposes and says he is one of the sureties to the above obligation; that he is a resi-
98 dent of said Territory, and that he is worth the sum of two thousand five hundred dollars beyond the amount of all his debts, exemptions, and liabilities, and that he has property liable to execution in said Territory equal to the said sum of two thousand five hundred dollars.

CHARLES F. MILLER.

Subscribed and sworn to before me this 18th day of June, A. D. 1877.
[COURT SEAL.] J. W. BRUNER,
Clerk District Court.

JUNE 18TH, 1877.

I hereby approve the within bond.

J. W. FISHER,
Chief Justice Wyoming Territory.

(Endorsed on the back as follows, to wit:) Erasmus Nagle vs. Thomas W. Rutledge. Bond upon writ of error and for supersedeas. Filed June 18th, 1877. J. W. Bruner, clerk supreme court. W. W. Corlett, att'y for pl'ff in error.

99 And thereafter, to wit, on the 20th day of June, A. D. 1877, there was filed in said court, in said cause, a citation, in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To Thomas W. Rutledge, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Wyoming, wherein Erasmus Nagle is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 18th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

J. W. FISHER,
100 *Chief Justice of the Supreme Court of Wyoming Territory.*

TERRITORY OF WYOMING,
County of Laramie, ss:

I, Charles F. Miller, do depose and say that I served the within citation by delivering a true copy of the same to Thomas W. Rutledge, within named, on the 19th day of June, A. D. 1877, at the county aforesaid.

CHA'S F. MILLER.

Sworn to and subscribed before me this 19th day of June, A. D. 1877.
[NOTARIAL SEAL.] J. K. JEFFREY,
Notary Public.

(Endorsed on the back as follows, to wit:) Erasmus Nagle vs. Thomas W. Rutledge. Citation. Filed June 20th, 1877. J. W. Bruner, clerk.

And thereafter, to wit, on the 18th day of July, A. D. 1877,
101 there was filed in said court, in the cause aforesaid, the opinion of the court, in the words and figures following, to wit:

Statement of case.

In the supreme court of Wyoming Territory.

ERASMUS NAGLE, PL'FF IN ERROR,
vs.
T. W. RUTLEDGE, DEF'T IN ERROR.

Error to Laramie County.

This was an action brought by the defendant in error, T. W. Rutledge, against the plaintiff in error, Erasmus Nagle, to recover the sum of $7,346.19, for the work, labor, care, and diligence of the said Rutledge, and for the material furnished and provided for the erection of a building for said Nagle, at his request, the plaintiff alleging that the amount named was due him Jan. 1, 1873, and that the said services and materials were reasonably worth said sum.

The defendant answered, 1st, by a gen'l denial; 2nd, payment;
102 3d, a special contract under which the building in question was to be erected for the sum of $5,530, & payment of that am't; 4th, a counter claim for damages for non-performance of the contract in several particulars.

After trial before Chief Justice Fisher and a jury, a verdict was rendered in favor of the plaintiff for $939.69. After a motion for a new trial had been made and refused, judgment was entered in accordance with said verdict; whereupon the case was brought by petition in error to this court.

M'r Corlett for pl'ff in error.

M'r Johnson for def't in error.

Opinion.

THOMAS, Justice:

While six errors are assigned in the petition in error, but one was really argued or urged upon the hearing of the case. It appears from the evidence that a contract, partly expressed and partly implied, was entered into between the pl'ff and def't for the construction of
103 the building in question. That this contract was made very loosely, and was subsequently very materially modified by the consent of parties in the way of alterations, additions, and extra work, and quality of material. The petition containing but one count; the counsel for the defendant at the close of the plaintiff's testimony, which related to these alterations, additions, et cetera, moved the court to order said plaintiff to elect on which of the separate causes of action he would proceed to verdict. And the chief error assigned throughout is the permitting by the court of these alleged several causes of action going

to the jury under the one count contained in plaintiff's petition. The court overruled the motion of the defendant, and we think properly, for two reasons:

First. That the petition under our rules of practice, as well settled by various decisions, was amply sufficient to cover and embrace the several items mentioned.

Second. That the motion to elect was made too late, that is to say, after all the evidence had been introduced on behalf of the plaint-
104 iff. If it had merits at all, it should have been introduced at a much earlier stage in the trial.

In reference to the first reason mentioned why said motion was properly overruled, it is proper to state that upon a careful examination of the entire record, we find that the items to which the greatest objection was made on the trial by the defence were either so far renounced, rejected, or explained before the close of the trial that the jury could not have been misled by them in arriving at their verdict; and that those items which still remained very properly came under the general count, for they were not entire and separate counts, but matters merely growing out of and connected with the principal contract, and were part thereof, as bearing the same relation thereto that branches do to a tree, growing and arising out of and forming and composing a portion of the same.

But, further, we consider the practice, as settled in this Territory, that in actions of the nature of the one under consideration, the gen-
eral count, as the one contained in the plaintiff's petition herein,
105 is sufficient to allow the proof of several items of a bill. We do not consider it necessary that there should be a separate count for each item when they are connected so intimately with the principal subject-matter as they are in this case.

We do not know that this question of practice has been previously decided in this court; but it has been in several instances in the various district courts of this Territory.

We are further of the opinion, from the examination of the record in this case—

First. That manifest and material justice has been rendered by the judgment of the district court herein.

Second. That even if such justice had not been strictly rendered, that it is exceedingly doubtful, to say the least, whether, if a new trial were granted, a different verdict and judgment, or one more nearly settling the rights of the parties herein justly and equitably, could be obtained.

Third. That in this instance the general presumption in favor of verdict and judgment should be given full weight.

106 As the other errors assigned were neither expressly urged nor fully argued, we do not deem it necessary further to refer to them, except to state that, upon due examination of them, we do not find in them any error that would justify this court in modifying or reversing the judgment of the district court.

Such judgment is affirmed and a writ of procedendo ordered.

Endorsed on the back as follows, to wit: "Supreme court. Rutledge vs. Nagle. Opinion. Filed July 18th, 1877. J. W. Bruner, clerk."

107 TERRITORY OF WYOMING,
In Supreme Court, ss:

I, J. W. Bruner, clerk of the supreme court of the Territory of Wyoming, do hereby certify that the foregoing pages contain true and correct copies of the petition in error, transcript, journal-entries of the court, affidavit of plaintiff as to value of matter in dispute, bond upon writ of error and for supercedeas, citation, and opinion of the court in the case entitled "Erasmus Nagle, plaintiff in error, against Thomas W. Rutledge, defendant in error," so full and entire as the same remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the city of Cheyenne, this 27th day of September, A. D. 1877.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

108 TERRITORY OF WYOMING.
In Supreme Court, ss:

I, J. W. Fisher, chief justice of the supreme court of the Territory of Wyoming, do hereby certify that J. W. Bruner, esq., whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the clerk of the said supreme court of said Territory, and the keeper of the records and the seal thereof, and that said clerk was duly appointed and qualified to office, and that all his official acts as such clerk are entitled to full faith and credit in all courts of record and elsewhere, and that the seal attached to said certificate is the seal of said supreme court, and that his said certificate is in due form of law, and that his signature thereto subscribed is genuine.

Given under my hand, at Cheyenne City, this 27th day of September, A. D. 1877.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

109 TERRITORY OF WYOMING,
In Supreme Court, ss:

I, J. W. Bruner, clerk of the supreme court of said Territory, do hereby certify that J. W. Fisher, esq., whose name is subscribed to the foregoing certificate of attestation, is, at the time of so doing, duly commissioned and qualified chief justice of the supreme court of said Territory, and that his said attestation is in due form of law, and that his signature thereto is genuine.

Witness my hand and the seal of said supreme court, hereto affixed at Cheyenne City, this 27th day of September, A. D. 1877.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

Cost of transcript and certificates, $29\frac{60}{100}$.

(Indorsement on record:) No. 868. Erasmus Nagle, pl'ff in error, vs. Thomas W. Rutledge. Wyoming Territory supreme court. Filed 12th October, 1877.

107 TERRITORY OF WYOMING,
In Supreme Court, ss:

I, J. W. Bruner, clerk of the supreme court of the Territory of Wyoming, do hereby certify that the foregoing pages contain true and correct copies of the petition in error, transcript, journal-entries of the court, affidavit of plaintiff as to value of matter in dispute, bond upon writ of error and for supercedeas, citation, and opinion of the court in the case entitled "Erasmus Nagle, plaintiff in error, against Thomas W. Rutledge, defendant in error," so full and entire as the same remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the city of Cheyenne, this 27th day of September, A. D. 1877.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

108 TERRITORY OF WYOMING.
In Supreme Court, ss:

I, J. W. Fisher, chief justice of the supreme court of the Territory of Wyoming, do hereby certify that J. W. Bruner, esq., whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the clerk of the said supreme court of said Territory, and the keeper of the records and the seal thereof, and that said clerk was duly appointed and qualified to office, and that all his official acts as such clerk are entitled to full faith and credit in all courts of record and elsewhere, and that the seal attached to said certificate is the seal of said supreme court, and that his said certificate is in due form of law, and that his signature thereto subscribed is genuine.

Given under my hand, at Cheyenne City, this 27th day of September, A. D. 1877.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

109 TERRITORY OF WYOMING,
In Supreme Court, ss:

I, J. W. Bruner, clerk of the supreme court of said Territory, do hereby certify that J. W. Fisher, esq., whose name is subscribed to the foregoing certificate of attestation, is, at the time of so doing, duly commissioned and qualified chief justice of the supreme court of said Territory, and that his said attestation is in due form of law, and that his signature thereto is genuine.

Witness my hand and the seal of said supreme court, hereto affixed at Cheyenne City, this 27th day of September, A. D. 1877.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court, Wyoming Territory.

Cost of transcript and certificates, $29\frac{60}{100}$.

(Indorsement on record:) No. 868. Erasmus Nagle, pl'ff in error, vs. Thomas W. Rutledge. Wyoming Territory supreme court. Filed 12th October, 1877.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1877.

ERASMUS NAGLE, Plaintiff in Error,
vs.
THOMAS W. RUTLEGE. } No. 868.

IN ERROR TO THE SUPREME COURT OF WYOMING TERRITORY.

MOTION TO DISMISS WRIT OF ERROR.

Now comes defendant in error by his counsel, and moves the court to dismiss the writ of error allowed herein, and for cause shows:

First. That the writ was improvidently issued, the amount in controversy not being sufficient to give this court jurisdiction to review the judgment and proceedings of the court below, as appears by the record.

EDWARD P. JOHNSON,
For Defendant in Error.

2.

THE RECORD SHOWS:

First. That the defendant in error commenced suit in the District Court of the First District of Wyoming Territory, to recover from plaintiff in error $7,346.19, alleged to be due as the reasonable value of work and services performed and material furnished by him to plaintiff in error at his request in and about the construction of a certain building in Cheyenne.

See Record, page 7.

Second. Plaintiff in error answered, setting up:

1. A general denial.

2. Payment.

3. That the cause of action if any arose on a special contract for the construction of said building, the provisions of which, so far as he was concerned, had been fully complied with.

4. A counter claim of $1,340, consisting of damages alleged to have been incurred by plaintiff in error in consequence of the failure of defendant in error to discharge his obligations according to the provisions of the special contract so set up.

5. An offset amounting to $210 with interest.

See Record, pages 7, 8 and 9.

Third. That the trial and subsequent proceedings resulted in a judgment, July 21st, 1876, in favor of the defendant in error of $939.53.

Record, page 30.

Fourth. That plaintiff in error caused the proceedings to be reviewed by the Supreme Court of Wyo-

ming, whereupon, on the 19th day of April, 1877, the judgment below was affirmed.

See Record, page 31.

See Record, Opinion, page 34.

Fifth. That plaintiff in error sued out a writ of error to this court, June 18, 1877, and lodged writ of citation and supercedeas bond in the office of the Clerk of the Supreme Court of Wyoming Territory on the same day.

Record. pages 1 and 32.

3.

POINTS.

I.

Numerous decisions of this court have long since settled the rule that where writ of error is brought by defendant in the original action, the matter in controversy is the amount of the judgment rendered in the court whose record is sought to be reviewed. No other authority is necessary on this point than the restatement and affirmance of the rule in

Merrill vs. Petty, 16 Wall, 338.

This case falls clearly under that rule, as this court can only review the judgments of the Supreme Court of the Territory, where the amount in controversy exceeds one thousand dollars.

Revised Statutes, U. S., Sec. 1909.

Unless the fact that defendant in the original action set up in his answer a counter claim amounting to $1,340 takes the case out from under the operation of the rule.

II.

A counter claim, unlike set off, must be a demand existing in favor of defendant and against plaintiff, arising out of the SAME TRANSACTION which gave rise to plaintiff's demand.

Laws of Wyo., 73, page 39, Sec. 92
" " " " 40, Sec. 96.

And standing alone as a separately stated and numbered defence it necessarily admits the existence of the transaction out of which the plaintiff's claim arises. (Although in this case the counter claim grows out of and depends upon the existence and breach of a contract set up anew by defendant below in his answer). But each of the five counts or separate defences of the answer must be considered as a defence standing alone. It is only by so doing that such inconsistant defences as we here find could be presented in the same answer. Considering the fourth count of the answer then, we have set up against the plaintiff's claim of $7.346.19, reduced by judgment to $939.63, a counter claim arising out of another cantract than the one declared on amounting to $1,340.

It is respectfully submitted that thus considered, the amount in controversy as it conclusively appears in the record, is not sufficient to give this court jurisdiction under the rule, as stated in

Ryan vs. Bindley, 1 Wall, 66.

EDWARD P. JOHNSON,
For Defendant in Error.

Supreme Court of the United States.

ERASMUS NAGLE, PLAINTIFF IN ERROR,

vs.

THOMAS W. RUTLEDGE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF WYOMING TERRITORY.

Brief of Plaintiff in Error upon the motion of Defendant in Error, to dismiss the writ of error.

I.

The motion on file in this case is to dismiss the writ of error, which is conceded to have been regularly sued out under the law, upon the ground that it was *improvidently* issued; meaning by that, that the record of the cause shows that the *amount in controversy in the case did not exceed one thousand dollars.*

The record shows, and the defendant in error concedes, that the plaintiff in the court where this case was originally tried, claimed of and from the defendant therein the sum of $7,346.19 for furnishing the materials and doing the work necessary to the erection of a certain building for the defendant, at his request, and that no part of the same had been paid, and asked a judgment for that sum; that the defendant in the action interposed—

1. A general denial of the allegations in plaintiff's petition.

[It would be more correct, however, to say that the de-

fendant in one of the defences in his answer, denied each and every allegation in the plaintiff's petition. See Record, page 7.]

2. Payment in full.

3. A counterclaim for $1,340 against the plaintiff.

4. An offset for $210, with interest, being an amount alleged to be due to the defendant from the plaintiff upon a promissory note.

The record further shows, what the defendant in error fails to mention in his brief, that the plaintiff in the trial court filed a reply in which he denied each and every allegation contained in the defendant's answer respecting the defendant's counter claim, and alleged that the note sued on by the defendant had been fully paid before the commencement of the action.

Upon the issues thus made by the pleadings, a verdict and judgment were rendered for the sum of $939.63 in favor of the plaintiff, which judgment was affirmed by the supreme court of Wyoming Territory.

The law of the United States regulating and limiting the right of reviewing the judgments of the supreme court of Wyoming Territory, is as follows:

"Writs of error and appeal from the final decision of the supreme courts of either of the Territories of New Mexico * * * and Wyoming shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, where the value of property or the amount in the controversy, *to be ascertained by the oath or affirmation of either party or other competent witnesses*, shall exceed one thousand dollars." * * * *

Revised Statutes, U. S., Sec. 1,909.

From this it will be seen that the statute which thus

gives a statutory right, at the same time prescribes the conditions of its enjoyment.

This statute provides that the amount in controversy or value of the property in order to entitle a party to his writ of error or appeal must exceed the sum of one thousand dollars, but it also provides that "the value of the property or amount in controversy" shall be ascertained by the oath or affirmation of either party, or other competent witness.

Now it is submitted that, under the law as it is, Congress has settled the question in this class of cases, as to how the question shall be settled as to what amount is in controversy in any given case. It is to be ascertained by the oath or affirmation of either party or other competent witness, and not by the Court upon a motion to dismiss the writ of error.

It would be competent for Congress to provide that writs of error and appeal, might be taken from the final decisions of the Supreme Courts of the Territories to the Supreme Court of the United States in all cases, irrespective of the amount in controversy. This being so, Congress may just as well say that the amount required to be in controversy to give a writ of error may be ascertained by a party to the action, as by this Court.

Numerous analogous provisions of law existing in the States might be here referred to, as where a party is allowed to have the venue of his cause changed upon making affidavit that the judge of the court is biased or prejudiced against him.

As a matter of fact the judge may not be thus affected towards the suitor, but the law in many of the States and Territories does not permit any controversy upon that allegation. It is settled and fixed by the character of the party's affidavit.

In this case the plaintiff in error has sworn that the amount in controversy in the case exceeds one thousand dollars, exclusive of costs. (See Record, pages 31 and 32.)

II.

But what was the amount in controversy, as ascertained by the record in this case? We insist that in every view of the case that amount did and does exceed one thousand dollars, so that the jurisdiction of this court attaches.

It is conceded by counsel for the motion to dismiss, that the defendant's answer claimed to recover from the plaintiff the sum of $1,340 as a counter claim and $210 as an offset. Both of the claims were resisted by the pleadings and evidence of the plaintiff, so that the case stands thus: The defendant claimed from the plaintiff $1,550 as a counter-claim and set-off. This amount of $1,550 was "in controversy" in the action, as both the pleadings and evidence show. Now, as to this counter-claim and set-off, the defendant was really a plaintiff. In the absence of some evidence in support of the claims he could not recover any part of this $1,550. Now, as the judgment was against the defendant, is he not entitled to be put in as good a situation as to his right to a writ of error as though he had brought an action against the plaintiff upon the causes of action represented by the counter claim and set-off, (as he might have done,) and had been defeated in the action? In the latter case his right to the writ would have been unquestionable. Does the mere fact that he makes his claims in an action where he is nominally defendant, but as to his claims is really a plaintiff, take away his right? If this question must be answered in the affirmative, then a person having claims against another, by whom he is sued, must omit to set them up in the same action as he is now permitted to do, or he is liable to be deprived of his right to come to this Court.

The pleading of a counter claim or a set-off is regulated by the Code of Civil Procedure in Wyoming Territory, and the sections of the Code regulating the whole subject, as

well as the section of the law regulating the method of rendering judgments in such cases, will now be quoted.

"SEC. 90. The answer shall contain—

First. A general or specific denial of each material allegation of the petition controverted by the defendant;

Second. A statement of any new matter constituting a defense, counter claim, or set-off, in ordinary and concise language and without repetition."

"SEC. 91. The defendant may set forth in his answer as many grounds of defense, counter claim, and set-off as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer."

"SEC. 92. The counter claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

"SEC. 93. If the defendant omit to set up the counter claim or set-off he cannot recover costs against the plaintiff in any subsequent action."

The Compiled Laws of Wyoming, page 45.

These provisions of the Code of Procedure of Wyoming are sufficient to show that a defendant in pleading a counter claim, or set-off, is merely a plaintiff as to such claims.

From the brief filed in support of the motion to dismiss, it would seem that counsel endeavors to escape from the conclusions above suggested by insisting that the fourth count of defendant's answer does not set forth a counter claim. In response to that it is sufficient to say—

First. That an examination of the fourth count of the answer will show that it is a counter claim, as a counter claim is defined by the law quoted; and,

Second. But that question was settled by the court below,

and cannot be reviewed here. The trial court treated count No. 4, in the answer, as a counter claim, and the defendant at no time placed himself in a position to take advantage of any error in such holding, if there existed such error.

By further provisions of the Code of Civil Procedure of Wyoming Territory, it will be seen that the court before which a case is tried, may render judgment for a defendant upon a counter claim or set-off, without any reference to the rights of the plaintiff to recover in the action.

"SEC. 378. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side as between themselves, *and it may grant to the defendant any affirmative relief to which he may be entitled.*"

"SEC. 380. In any case where a set-off or counter claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed the action or failed to appear."

The Compiled Laws of Wyoming Territory, page 82.

It will be seen, therefore, that under the laws of Wyoming, a defendant as to a set-off or counter claim stands in all respects in the same situation as though he were a plaintiff in the action. His right to a judgment upon either the set-off or counter claim, pleaded in his answer, is in no way dependent upon the plaintiff's recovery in the action or upon any action which the plaintiff may take subsequent to the bringing of the action. The defendant in this action was therefore virtually plaintiff as to claims in controversy in the action, amounting to $1,550, and as judgment was rendered against him, he is clearly entitled to his writ of error upon the law of Congress above cited, and the principle announced by this Court in Ryan *vs.* Bindly, 1 Wall., 66.

W. W. CORLETT,
Counsel for Plaintiff in Error.

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Supreme Court of the United States.

—No. 275.—

OCTOBER TERM, 1879.

ERASMUS NAGLE, Plaintiff in Error.

vs.

THOMAS W. RUTLEDGE, Defendant in Error.

In Error to the Supreme Court of Wyoming Territory.

BRIEF FOR PLAINTIFF IN ERROR.

W. W. CORLETT, Counsel for Plaintiff in Error.

Statement of Case.

This was an action brought in the District Court of Wyoming Territory, within and for Laramie County, by the defendant in error Rutledge against the plaintiff in error Nagle, to recover the sum of $7,346.19, with interest for "work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time performed and bestowed in the erection of the two-story brick building situated on the corner of 17th and Ferguson Streets, in Cheyenne, Laramie County, Wyoming Territory, for said defendant and at his request, and also for materials and other necessary things by the said plaintiff before that time furnished and provided for in and about said said building and at his like request, and which said services and materials, and other things so furnished as aforesaid, were reasonably worth the said sum of seven thousand, three hundred and forty-six dollars and nineteen cents."

[Record, page 7.]

The defendant in the action, Nagle, filed an answer, setting forth: 1.—A general denial. 2.—Payment in full. 3.—Plea of a special and express contract for the erection of the building, and full performance by defendant. 4.—A counterclaim for damages sustained by the defendant by reason of breaches of said express contract on the part of the plaintiff Rutledge. 5.—An offset for $210, with interest thereon, at the rate of three per cent. per month, from July 24, 1872, upon a promissory note given by plaintiff to defendant.

[Record, pp. 7-8-9.]

The plaintiff filed a reply denying all the new matters set up in the answer except the offset upon the note, and as to the note pleading payment.

[Record, page 9.]

The case was tried at the May Term, 1876, of said District Court before Mr. Justice Fisher and a jury, and a judgment rendered for $939.63.

[Record, page 30.]

During the trial of the case exceptions were taken to the rulings of the court in overruling a motion in behalf of the defendant to compel the plaintiff to elect on which of the several and distinct causes of action shown by his evidence he would proceed to judgment, and in giving to the jury certain instructions, and in refusing certain instructions, to which rulings of the court exception was duly taken by the defendant (the present plaintiff in error), and which will now be considered in their order.

ERRORS ASSIGNED.

1. That the trial court erred in overruling the motion of the defendant in that court, to compel the plaintiff to elect on which of the several causes of action, shown by his evidence, he would proceed to verdict and judgment.

[Record, page 16.]

2. That the trial court erred in giving to the jury, on motion of plaintiff's counsel, instruction No. 1, in reference to the

right of a debtor to make an appropriation of payments made by him.

[Record, page 25.]

3. That the trial court erred in giving to the jury, on the motion of the plaintiff, instruction No. 2, in reference to the appropriation by the plaintiff of certain payments made to the defendant.

[Record, page 25.]

4. That the trial court erred in refusing to give to the jury the 8th instruction, requested by the defendant, in reference to the right of the plaintiff to recover in the action for more than a single distinct demand or cause of action.

[Record, page 26.]

5. That the trial court erred in giving to the jury, upon its own motion, certain instructions in reference to the right of the plaintiff to recover.

[Record, pages 27-28.]

6. There are other manifest errors in said record.

Points of Law.

I.

On the first error assigned, namely, the refusal of the trial court to compel the plaintiff, at the close of his evidence, to elect upon which of the several distinct and separate causes of action constituting his demand, as shown by his evidence, he would proceed to verdict and judgment, it will be observed that the plaintiff's amended petition, upon which the case was tried, contains but a single cause of action for work and labor and for material. The petition is not framed to recover a sum due upon an account, nor is there anything in the petition to show that any recovery was sought except upon a single transaction and cause of action. The petition is a mere *indebtatus assumpsit* count for the *reasonable value* of certain work and materials furnished. When, however, the plaintiff produced his testimony it clearly disclosed that he was seeking to re-

cover, for several distinct causes of action, some of them based upon implied contracts and some upon express contracts, in which the price to be paid and all other terms of the contract were fixed by the express agreement of the parties.

To illustrate this let us refer to the evidence of Mr. Rutledge, the plaintiff, on page 12 of the record, where, in speaking of his arrangement with the defendant in reference to excavating the cellar of the building in question, he says: "I commenced the work on the building in June, 1872. I excavated the cellar at that time. I had an express contract with Mr. Nagle in regard to the excavation of the cellar and amount to be paid for it. I believe the amount I was to be paid was $125.00. I think there was a writing in regard to it. I do not know but I receipted in full for the amount to be paid for excavating the cellar." [Witness here admits the signature to a receipt, afterwards offered in evidence and marked "Exhibit A," to be his.]

The exhibit referred to will be found on page 24 of the record and is as follows:

"Cheyenne, June 1st, 1872.

"Re'ed of E. Nagle one hundred and twenty-five dollars to apply in full for excavation of cellar on lot 1 & 2, block 391, cor. of 17th & Ferguson streets, to be 24x48 feet square, 6 feet deep or thereabouts, sufficient for a cellar, 7 ft. in the clear below the city grade. T. W. RUTLEDGE."

Now, by reference to the plaintiff's testimony on page 11 of the record, we find that the plaintiff's claim, as made in his petition, included a demand of $150,00 as the reasonable value of excavating this cellar, the exact words of the plaintiff in his testimony being, "The reasonable value of all these was * * * Excavating cellar $150.00."

By reference to other portions of the testimony of the plaintiff, found on pages 13 and 14 of the record, it will be seen that the plaintiff also admitted express and separate contracts with the defendant as to the construction of the sidewalk, the wooden front in the building, a certain partition in the building which was to be put in for $50.00. This testi-

mony of the plaintiff also shows that there were separate, independent and express contracts fixing the price to be paid for the plastering and the painting to be done in the building.

When these facts were made to appear from the plaintiff's own evidence as to these distinct, express and independent contracts for portions of the work in the construction of the building, and that the plaintiff was seeking to recover for all that he did in the construction of the building upon a single count in his petition, according to the reasonable value of all the work done, thus ignoring his special contracts, the defendant made the motion to compel the plaintiff to elect, &c., as shown by the record.

We think the overruling of this motion was error, and deprived the defendant of a substantial right—

1. Because there being but one cause of action set out in the petition, the defendant could not anticipate that a recovery was sought on more than one; and

2. Because there being but one cause of action set out in the petition, there is no foundation in the record to support a judgment but for a single cause of action; and

3. Because even an amendment will not be permitted which adds to a petition a distinct and separate cause of action.

Except in the anomalous cases of actions for *nuisance* or *disturbance* and *trespass* where the wrongs are of such a nature as to be continuous in their effects, and except in an action upon an account, the rule of the common law confined the plaintiff's right of recovery, when his declaration contained but a single count, to a single transaction.

See Gould's Pleadings, (4th edition,) pp. 91–92; sections 84–85, et sequitur.
Phillips on Evidence, vol. 1, pp. *854 and *857, (note.)
Pierce vs. Pickens, 16 Mass., 470.

The adoption of a code of civil procedure in Wyoming has

not changed the common law rule upon this subject. The provision of the code of that Territory is as follows:

"Sec. 81. The petition must contain

* * * * * *

"Second, A statement of the facts constituting the cause of action in ordinary and concise language and without repetition.

* * * * * *

"Fourth, When the petition contains more than one cause of action, each shall be separately stated and numbered." [Compiled Laws of Wyo., page 44.]

If it had appeared on the face of the petition that the plaintiff claimed to recover for several causes of action, the defendant might, at an earlier stage in the case, have reached the difficulty by a motion to compel the plaintiff to separately state and number his causes of action; but that fact did not so appear in the petition. The defendant therefore had no remedy except when the facts were made to appear, to ask that the plaintiff in recovering be confined to one cause of action.

We take the rule to be that it is essential that every separate cause of action must stand upon a statement of the facts constituting it, and that without such statement no valid judgment can be rendered. [McAllister vs. Kuhn, 6 Otto, 87.]

As already stated, it would not have been permissible in this case for the plaintiff to amend his petition so as to set out his several causes of action in the petition in lieu of the single cause of action actually set out. In reference to the power of amendment the code of civil procedure of that Territory is as follows:

"Sec. 133. The court may, before or after judgment, in furtherance of justice, and in such terms as may be proper, amend any pleading * * * by adding or striking out the name of a party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or

proceeding to the facts proved, when such amendment does not change substantially the claim or defense." [Com. Laws of Wyoming, pages 49–50.]

Although the power of amendment by the provision just quoted is very extensive, yet it will be noted that the power is limited in all cases to such amendments as do "not change substantially the claim or defense."

Any amendment which would put two or more causes of action in a petition which before contained but one cause of action, would be clearly inadmissible.

II. III.

The second and third assignment of errors involve substantially the same question, and may be considered together. They relate to instructions given to the jury by the court on the trial, upon the request of the plaintiff in the action, which instructions were as follows:

"1. The debtor who owes his creditors money on distinct accounts may direct his payments to be applied to either, as he pleases. If the debtor makes no appropriation, the creditor may apply the money as he pleases.

"2. If you find in this case that Rutledge was prior to the commencement of the building indebted to the defendant on two or more accounts, he had a right to apply the payments made to either as he chose, in the absence of an appropriation by Nagle. And if he applied his payments to the note, it would be sufficient payment to support the plea of payment in the reply."

[See Record, page 25.]

To the giving of each of these instructions the defendant objected and excepted.

These instructions, it is claimed, do not correctly state the law applicable to the case, and were calculated to prejudice the defendant, which will be apparent when their object and effect are seen.

By reference to the answer of the defendant it will be seen that the defendant pleaded an offset against the plaintiff upon

a promissory note for $210.00, dated on the 24th day of June, 1872. This note was payable thirty days after date, *with interest after maturity at the rate of three per centum per month until paid.*

[See Record, pp. 8 and 9.]

It is evident that the defendant was not only entitled to this demand, but likewise to interest on the amount of the note, at the stipulated rate of three per cent. per month from maturity until the rendition of the verdict, unless it had been previously paid. At any rate, the defendant would be entitled to interest on the amount of the note until it was paid. The evidence in the case shows that the plaintiff commenced the erection of the building in question about the first of June, 1872, and finished what he did about the matter in the latter part of the same year; so that the plaintiff in bringing his action claims that the amount was due him on the 1st day of January, A. D. 1873. The note became due July 24th, 1872, and of course drew interest at three per cent. per month after that date. By reference to the exhibit in the record, known as "Exhibit C," it will be seen that the plaintiff owed the defendant a considerable sum upon an account when the note was given and a considerably larger sum when the note became due.

[See Exhibit C, commencing on page 3 of the Record.]

The only evidence given in the case in reference to the payment of the note in question was that given by the plaintiff himself, and was as follows:

"The note has been paid. When there was money enough due me on the work to pay the note I directed the money to be applied in that way."

In his cross-examination, plaintiff testified further upon that point, as follows:

"This was soon after the note became due. I have sued for the same work and materials I applied on the payment of the note. I owe him $210.00, but no interest."

[See Record, page 24.]

The object on the part of the plaintiff in procuring these in-

structions to the jury was to prevent the defendant from getting any interest upon his note.

The plaintiff did not pretend that he paid the note in lawful money, but only that when there was a sufficient sum due him from the defendant on the building contract he directed it to be applied to the payment of the note, which, he says, he did shortly after the note was due. Both the plaintiff and defendant agree that the defendant's store bill account, as shown in "Exhibit C," [page 3 of Record], was to be paid by the work done and materials furnished by the plaintiff in the construction of defendant's building. When the note became due, (July 24, 1872), the defendant's store account amounted to several hundred dollars—much more than could have been due the plaintiff for what he had done in the erection of the building, even if the defendant had been entitled to any payment before the building was finished, of which there is no evidence in the record.

This being the case we claim, in behalf of the defendant in error, that the intructions 1 and 2 complained of were clearly erroneous.

1. Because they were wholly inapplicable to the case presented, and misleading.

2. Because the instructions, and especially No. 2, assumed facts which were in dispute, and took such disputed questions of fact from the jury. There was no competent evidence in the case of a payment of this note.

3. Because, even if there had been any valid evidence of a payment by the plaintiff which was applicable to said note, the instructions did not correctly state the law.

It is undisputed that the plaintiff paid no *money* to the defendant which could have been appropriated to the payment of the note in question, either by the debtor or the creditor. All that is claimed in behalf of the plaintiff as to the matter is that at some time not stated or fixed, the defendant became indebted to the plaintiff, on the building contract, in a sum sufficient to pay the note, and that the plaintiff then directed the

defendant to apply the sum thus due him to the payment of the note. There is neither evidence nor pretence that the defendant assented to this. This being the case, was he legally bound to make the approrpriation as directed? We think not, because there was, in fact, no payment at all by the plaintiff Rutledge. There were only mutual demands between the parties, at best, which they could set off against each other by mutual agreement; but neither could do this without the assent of the other. The doctrine of the law in respect to the appropriation of payments of money made by debtors who are owing distinct debts, has no application to this case. If a man owes another a debt evidenced by note or otherwise, he can discharge it only by a payment of lawful money, unless the creditor agrees to take something else.

These instructions, therefore, severally contain error, and were well calculated to deprive the defendant of his interest, as fixed by the contract of the parties, by giving the jury to understand that the plaintiff could extinguish the defendant's note by directing that the defendant apply to its payment an assumed indebtedness of defendant to plaintiff, and were further calculated to prejudice defendant's rights by assuming to the jury as a fact that payments had been made sufficient to discharge the note.

See Willard's Equity Jurisprudence, page 92 to 104, and the cases there cited.

IV.

The fourth error assigned by the plaintiff in error is that the court upon the trial of this case refused to give to the jury, upon his application, the 8th instruction, requested by him, which was as follows:

"If you find from the evidence that any portion or portions of the demand sued for in this action accrued or became due from the defendant to the plaintiff upon express contract, or contracts which were entirely independent of, and disconnected from, the other portion or portions of the demand sued

for, then you can find a verdict only for a single one of such distinct demands."

[See Record, page 26.]

Thn question of law intended to be presented by this instruction is akin to the question presented upon the first error complained of and above considered. The only difference between this alleged error and the one first above complained of is that this instruction required the jury, if they found, from the evidence, that the plaintiff was seeking to recover upon *several distinct and separate* causes of action or demands, to render a verdict only for the amount due upon *one* of such causes of action, because the plaintiff's petition was so drawn as to preclude any recovery except for a single cause of action.

Under the first error assigned and discussed, allusion was made to the portions of the plaintiff's evidence showing clearly that he was seeking to recover for divers causes of action. It is sufficient to say in addition to what was then said, that the evidence of the defendant showed still more clearly and satisfactorily that the plaintiff's demand was based upon independent and distinct causes of action. But if it be alleged that the existence of such distinct causes of action as the basis of the plaintiff's entire demand in the case was a disputed question of fact in the case then, the 8th instruction requested by defendant and now being considered is not obnoxious to objection, because it leaves the question of the existence of such distinct causes of action to the jury to limit their finding for the plaintiff to the amount due on *one* cause of action, in case they find that there were several such distinct causes of action embraced in the plaintiff's claim.

[See authorities cited under first error assigned.]

V.

The defendant on the trial of this cause excepted to the following portion of the charge given to the jury by the trial court upon its own motion:

"The plaintiff's petition sets out that defendant employed the plaintiff to erect a storehouse for him on the corner of Ferguson and 17th Streets, in Cheyenne; that there were no specific terms agreed on between them, so far as the amount to be paid for its construction was concerned, although he admits that certain portions of the building were constructed under special stipulations, but alleges that the defendant failed to comply with his part of the stipulations; hence he (plaintiff) is released from such special contracts, and therefore presents his account for material furnished, and work and labor done.

"Now, if the evidence satisfies you that the building was to be erected in manner and upon the terms claimed by plaintiff, then you are to find whether the charges made by plaintiff are or were the reasonable value of such materials and labor at the time they were furnished, and, if so, then your verdict should be on that basis, deducting from the amount thus found the several sums shown by the evidence to have been paid by defendant before, during and since the construction of the building."

(See Record, page 28.)

The first observation to be made respecting this instruction given by the court is, that it has confounded the plaintiff's petition and his claim, as made therein, with the evidence on the trial. The instruction starts out by undertaking to state what the plaintiff sets out in his petition, but fails entirely to state the purport or effect thereof. Nay, worse, it states the claim as made by the plaintiff's petition untruly. The court having thus entirely failed to state the plaintiff's case as made by the pleadings, and having confused the pleadings with the evidence, the issues in the case were not correctly presented to the jury. It is difficult to perceive how the court could have thus misapprehended the case as it stood on the pleadings, but it is a fact, nevertheless, as will be seen by reference to the petition.

[See Record, page 7, where the petition on which the case was tried is set out.]

The court, after thus erroneously setting out the plaintiff's claim as made in his petition, proceeds to instruct the jury, as follows:

"Now, if the evidence satisfies you that the building was to be erected in the manner and upon the terms claimed by plaintiff, then you are to find whether the charges made by plaintiff are or were the reasonable value such materials and labor, &c.. * * * and if so, then your verdict should be on that basis, &c."

In other words, the clear meaning of this instruction is that, notwithstanding the evidence shows on both sides, that certain portions of the whole work in the construction of the building were performed under express contracts for a fixed agreed price, and some of which, as in the case of the work of excavating the cellar, and the plastering contract, were fully paid for, yet if the jury are satisfied the building was to be erected "in the manner and upon the terms claimed by plaintiff," (as had just been erroneously stated by the court,) the jury are to disregard the contracts of the parties as to the price to be paid for distinct portions of the work, and are to allow the plaintiff for all the work at its reasonable value. The result of this would be that, although the cellar was to be excavated by the plaintiff for $120.00, (see receipt in full therefor at the bottom of page 24 of the Record,) still the plaintiff might recover $150.00 therefor, as he himself swears the last named sum was the reasonable value of that work. The same remark would be true as to any other portions of the work which were to be done on special contract between the parties at a fixed price, if this instruction as given to the jury was correct.

It cannot be said that no harm resulted to the defendant from such an instruction, because it deprived the defendant of the benefit of his contract price, even as to such portions of the work as the plaintiff admits were done under distinct and express contracts with a fixed price for the work.

"It is the duty of the court to enforce, not to make or change, the contracts of parties."

Williams vs. Roberts, 3 Ohio, 42.

"If the instructions to the jury on a question of law, involved in the issue, be manifestly erroneous, the judgment should be reversed unless it clearly appear, from the whole record, that the party against whom it was committed could not have been prejudiced thereby."

Pendleton St. R. R. Co. vs. Stallman, 22 Ohio St., R. page 1.

1. Graham & Waterman on New Trials, pp. 261–262–264–267–268–269.

3. Graham and Waterman, New Trials, pp. 710–711–717–768–824.

The court also assumed in the instruction, now under consideration, that although parts of the whole work might have been performed under special stipulations, still if the defendant "failed to comply with his part of the stipulations," then such special stipulations were to go for naught and the plaintiff could recover the reasonable value of the work, notwithstanding the special stipulation. Herein we also believe there was palpable error. We understand the rule of law on that point to be that where a contract is made between parties embracing mutual covenants or undertakings the failure of one party to keep his agreements in the contract does not absolve the other from performance on his part, unless the covenants thus broken are *conditional and dependent*. In other words, when there are mutual stipulations in a contract, each party is bound to perform on his part, notwithstanding default on the part of the other party, unless he can show that performance by the other party was a condition precedent to requiring performance on his part.

2 Parsons on Contracts, (5th edition,) pp. 528–529; notes (q) and (r).

Jones vs. Barcley, Douglas 690.

Campbell vs. Jones, 6 T. R., 570.

Goldsborough vs. Orr, 8 Wheaton, 217.

Robb vs. Montgomery, 20 Johns. 15.

In this case, so far as the express and special contracts between plaintiff and defendant for the performance of certain portions of the work at fixed prices were concerned, there was no evidence whatever in the record showing that the mutual stipulations of the parties were such that the plaintiff was absolved from the contract because of non-performance by the defendant.

The court laid down the broad proposition in the instruction now being considered, that if one party to a contract broke it the other party was released from his obligations. This was error, because, not containing the qualification above mentioned, and because there was no evidence which warranted the court in assuming that the express contracts between the parties had heen abrogated, or that the stipulations made by the defendant in the express contract were *conditions* precedent to the performance of the stipulations of the plaintiff.

W. W. CORLETT,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

ERASMUS NAGLE, Plaintiff in Error.

vs.

THOMAS W. RUTLEDGE, Defendant in Error.

In Error to the Supreme Court of the Territory of Wyoming.

BRIEF OF DEFENDANT IN ERROR.

This was an action brought by defendant in error to recover the value of certain work done and materials furnished in and about the construction of a brick building in Cheyenne, Wyoming Territory. The defendant in error obtained judgment in the District Court, which was affirmed in the Supreme Court of the Territory and brought here, when a motion was made to dismiss which is now pending and undetermined. The evidence discloses that during the progress of the work, special arrangements were made by the parties as to the price of portions of the work, and these prices so fixed were accepted and used as the value of the work in arriving at the amount due. It is further in evidence that defendant in error was indebted to plaintiff in error in the sum of $210, and perhaps some in-

terest upon a note, and that when he had performed sufficient work, the defendant in error directed that it be credited or applied upon the note.

See Record, page 24.

And there seems to be but two questions involved in the case; viz:

First, The right of Rutledge to recover upon the one count in his petition for the work performed and materials furnished, it being shown that portions thereof were done and furnished under special agreements as to price.

Second, The question as to the payment of the note by the application of moneys due Rutledge from Nagle, he (Rutledge) having directed such application.

Proceeding to the discussion of the first question, we find the well settled rule to be: That when there is a special agreement, and the plaintiff has performed upon his part, he may declare on the implied assumpsit, or, in other words, if there is a special contract to perform any work a general *indebitatus assumpsit* will lie, when the work is performed and completed, the recovery being upon the *quantum meruit*, with the agreed price as the criterion of value, or the measure of damages.

1 Nash's Pleading and Practice, pages 353 and 361.
Jewell vs. Schroeppel, 4 Cow., 564.
Feeter vs. Heath, 11 Wend., 484.
Clark vs. Fairchild, 22 Wend., 576.
Farron vs. Sherwood, 17 N. Y., 227.
Kerstetter vs. Raymond, 10 Ind. 199.
2 Greenleaf, section 104, and cases cited.

As to the second question, the instruction of the court complained of is in the exact language of the authorities and the doctrine as announced in the instruction, is correct and well settled. No question as to the time when the application of the money was directed can be raised, as nothing to the contrary appearing, it will be presumed that the same was made at the proper time.

Reference to authorities upon this question seems unnecessary, but we cite 2 Parsons on contracts, page 627.

It is submitted that no error of law appears, that material justice was done by the judgment, and upon such a case as is here presented this court will not interfere. If there had been a slight inaccuracy as to a legal proposition which did not affect the substantial rights of parties this court would not interfere, and inasmuch as upon the testimony as presented, the jury brought in a verdict for Rutledge, and nothing tending to show that they acted upon improper motives, or failed to give the case the degree of consideration it required, the verdict will not be disturbed.

In addition to the first proposition submitted as to the several specific arrangements made, Rutledge claimed that Nagle failed to carry out his part of the contract, which of itself is a sufficient answer to the argument of plaintiff in error urging those contracts as a defense.

In conclusion, believing that the errors of law complained of do not exist, but that the judgments and instructions of the court were correct, and that the verdict was in strict accord with the evidence, that the rights of the parties were fairly dealt with, and the judgment a just determination of those rights, we respectfully submit the case.

W. R. STEELE,
Attorney for Defendant in Error.